Donny Stewart Jr.
New Bern, North Carolina • (252) 474-6904 • stewde21@wfu.edu • www.linkedin.com/in/donny-stewart-jr

June 12, 2023

Hon. Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

As a third-year student at Wake Forest University School of Law with a strong commitment to justice and advocacy, I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am particularly interested in learning from you due to your background in criminal law, an area of law in which I plan to practice in the future. Additionally, as a person of color that is part of the LGBTQ+ community, it would be meaningful to work with and learn from someone who understands that perspective. Clerking in your chambers at the U.S. District Court for the Eastern District of Virginia would be an honor and is my first choice for employment after graduation from law school.

The breadth of my undergraduate and law school activity both in and out of the classroom reflects my commitment to tackling systemic social justice issues. The murder of Trayvon Martin was a pivotal moment that directed my path toward law school, and I have since worked to bring awareness to the unique issues faced by marginalized groups. Post graduation, I intend to use my law degree to help alleviate those issues to the best of my ability. I have already begun this work through my involvement in the Juvenile Sentence Review Board *pro bono* project, in which I drafted a clemency petition for an incarcerated person, and in my previous summer internship at the Forsyth County Public Defender's Office, where I worked to provide indigent defendants with the best legal representation possible.

I am confident that I could contribute meaningfully to the U.S. District Court for the Eastern District of Virginia in Norfolk, VA. As an intern with Judge Loretta Biggs in the U.S. District Court for the Middle District of North Carolina this summer, I am conducting extensive research and drafting orders which provide rulings on motions for compassionate release. As a teaching assistant for the Legal Analysis, Writing, and Research course this past year, I have developed strong writing and research skills and have facilitated growth in these areas for first-year law students as well. I will further strengthen these skills in the Appellate Advocacy Clinic this year where I will brief and argue cases in federal courts of appeals. I have also completed relevant coursework in trial advocacy and will complete a course on federal courts this fall.

I would welcome the opportunity to interview with you. I have included my resume, writing sample, undergraduate transcript, and law school transcript. Professors Esther Hong, Brenda Gibson, and Eileen Prescott have submitted separate letters of recommendation on my behalf. If I can provide any additional information, please let me know. Thank you for your time and consideration.

Respectfully,

Donny Stewart

Donny Stewart Jr.

New Bern, North Carolina • (252) 474-6904 • stewde21@wfu.edu • www.linkedin.com/in/donny-stewart-jr

EDUCATION

Wake Forest University School of Law, Winston-Salem, North Carolina **May 2024**
Juris Doctor Candidate
GPA: 3.446/4.000
Honors: Fletcher Scholar
Employment: Teaching Assistant, *Appellate Advocacy, Professor Brenda Gibson*
Lexis Student Representative, *LexisNexis*
Teaching Assistant, *Legal Analysis, Research, and Writing, Professor Brenda Gibson*
Research Assistant, *Professor Esther Hong*
Involvement: Vice President, *Black Law Students Association*
Member, *Phi Alpha Delta*
Member, *Chief Justice Joseph Branch Inn of Court*
Event Coordinator, *Society for Criminal Justice Reform*
Participant, *Stanley Moot Court Competition*, *Walker Moot Court Competition*, *Transactional Law Competition*
Pro Bono: Juvenile Sentence Review Board
Name Change Clinic

Campbell University, Buies Creek, North Carolina **May 2021**
Bachelor of Arts, Criminal Justice Pre-Law, summa cum laude and *Bachelor of Science, Psychology, summa cum laude*
GPA: 3.94/4.00 (Top 5%)
Honors: Sara Virginia Hackney Award of Excellence
Outstanding Senior in Psychology Award
Employment: Peer Mentor
Student Life Office Intern
Resident Assistant
Honor Societies: Sigma Tau Delta, Pi Sigma Alpha, Pi Gamma Mu, Alpha Phi Sigma, Psi Chi
Involvement: Member, *Antiracism Student Committee*
Co-founder & President, *Social Justice Club*
President, *Criminal Justice Association*
Member & Team Leader, *Orientation Leader*
Member, *Step-Up Program*
Member, *Mock Trial*

EXPERIENCE

Judicial Chambers of The Honorable Loretta C. Biggs, Winston-Salem, North Carolina
Judicial Intern Apr. 2023 – Present
- Research applicable law regarding Motions for Compassionate Release
- Review and summarize motions and draft orders ruling on those motions
- Observe legal proceedings in various stages of the adversarial process

Forsyth County Public Defender's Office, Winston-Salem, North Carolina
Legal Intern May 2022 – July 2022
- Transcribed and summarized complex law enforcement body camera footage into usable court transcripts
- Performed legal research and drafted memoranda to determine the strength of potential arguments and defenses
- Observed legal proceedings in various stages of the adversarial process

Craven County District Attorney's Office, New Bern, North Carolina
Intern May 2019 – Aug. 2019
- Observed legal proceedings in various stages of the adversarial process
- Communicated information between legal staff and court officials
- Constructed and organized dozens of case files and prepared them for use in court

Texas Steakhouse and Saloon, New Bern, North Carolina
Host/Server Oct. 2015 – Mar. 2020
- Monitored the status of the entire restaurant, tracked seating capacity, and maintained order in the dining room
- Greeted and seated hundreds of diverse guests while ensuring their experience was enjoyable
- Accurately noted and communicated food orders and delivered meals in a timely fashion; used time management and customer service skills to provide excellent service to guests of the restaurant

OFFICIAL TRANSCRIPT

WAKE FOREST UNIVERSITY

Office of the University Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

Student Name: **Donny Earl Stewart, Jr.**

ID: 06531732 Birthdate: 12/11

Majors: Law

Minors:

Entry Date: Aug 16, 2021
Certificates and
Foreign Area Studies

School of Law

Issued To:

Donny Stewart
Parchment:TWBHFUYP

Date Printed: 04-JUN-2023 Page: 1

Course Level: Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021						
LAW	101	Contracts I	3.00	A-	11.010	
LAW	103	Criminal Law	3.00	B+	9.990	
LAW	104	Civil Procedure I	3.00	B+	9.990	
LAW	108	Torts	4.00	A-	14.680	
LAW	110	Legl Analysis, Writing & Res I	2.00	A-	7.340	
LAW	112	LAWR I (Research)	0.50	A-	1.835	
LAW	122	Professional Development	0.00	S	0.000	
Ehrs: 15.50 GPA-Hrs: 15.50 QPts: 54.845 GPA: 3.538						
Spring 2022						
LAW	102	Contracts II	3.00	B+	9.990	
LAW	105	Civil Procedure II	3.00	B+	9.990	
LAW	111	Property	4.00	B+	13.320	
LAW	113	LAWR II (Research)	0.50	B+	1.665	
LAW	119	Legl Analysis, Writng & Res II	2.00	A-	7.340	
LAW	120	Constitutional Law I	3.00	B+	9.990	
LAW	122	Professional Development	1.00	A*	0.000	
Ehrs: 16.50 GPA-Hrs: 15.50 QPts: 52.295 GPA: 3.373						
Fall 2022						
LAW	200	Legislation and Admin Law	3.00	B+	9.990	
LAW	207	Evidence	4.00	A-	14.680	
LAW	209	Constitutional Law II	3.00	B+	9.990	
LAW	219	Appellate Advocacy LAWR III	2.00	A	8.000	
LAW	405	Crim Pro: Investigation	4.00	B+	13.320	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 55.980 GPA: 3.498						
Spring 2023						
LAW	500	Crim Pro: Selected Topics	2.00	A-	7.340	
LAW	508	Family Law	3.00	B	9.000	
LAW	530	Natural Resources Law	2.00	B+	6.660	
LAW	564	Immigration Law	3.00	H	0.000	
LAW	579	Policing & Legal Institutions	3.00	H	0.000	
LAW	610	Trial Practice Lecture	0.00	S	0.000	
LAW	610L	Trial Practice Lab	3.00	P	0.000	
Ehrs: 16.00 GPA-Hrs: 7.00 QPts: 23.000 GPA: 3.285						

********** CONTINUED ON NEXT COLUMN **********

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	64.00	54.00	186.120	3.446
TOTAL TRANSFER	0.00	0.00	0.000	0.000
OVERALL	64.00	54.00	186.120	3.446

********** END OF TRANSCRIPT **********

AN OFFICIAL SIGNATURE IS WHITE WITH AN OLD GOLD BACKGROUND

REJECT DOCUMENT IF SIGNATURE BELOW IS ALTERED

Ken J. Gilson, EdD
University Registrar and Assistant Provost for Academic Administration

June 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Donny Stewart as a clerk for your chambers. I have known Donny since his 1L year at Wake Forest, when he approached me to discuss research and volunteer opportunities in criminal law. I worked alongside him in my capacity as the advisor for the Society for Criminal Justice Reform (SCJR), and he was a top student in my spring seminar on prosecutors. Based on my experiences with him, I consider him to be a kind, curious, and driven person who would contribute significantly to both the work and culture of your chambers.

I have had the pleasure of working with Donny both as a student and as a peer. He is the first in his family to attend college and the first to attend law school, and we at Wake Forest felt strongly enough about his unique perspective to offer him the Fletcher Scholarship for a full ride, which only one student per class receives. His passion for criminal law is driven by a broad care for community as well as personal experiences with the harm that incarceration can cause families. He has repeatedly demonstrated thoughtfulness and empathy, both in my class (through creative ideas and challenging questions) and in his contributions to our local legal community (such as his work with the Inn of Court and planning events for SCJR). When he encounters new or unfamiliar issues, Donny unhesitatingly searches for more information and seeks out whoever may be able to help him understand. I have been so impressed with this quality of his that I invited him to be my research assistant next fall.

Donny is not a traditional federal clerkship candidate; he is motivated to develop the skills that will help him serve his clients and community, rather than seeking prestige. In short, he wants to understand the law and its practicalities in order to create justice where it is missing. To that end, he has already sought out experience in prosecution, defense, and a federal district chambers. He has pursued training in oral advocacy, criminal legal work, and volunteer work that brought him in direct contact with men imprisoned as children who are seeking clemency review. While he has not participated in a journal, his research and writing in my class leads me to recommend him with absolute confidence.

I consider Donny to be deeply compassionate, inquisitive, and insightful. I am excited to work with him more before he graduates, and I believe he would be an excellent addition to your chambers. If I can be of any assistance in reviewing his application, please feel free to contact me.

Sincerely,
Eileen R. Prescott

Cell: (309) 229-3311

Email: prescoe@wfu.edu

WAKE FOREST
UNIVERSITY
SCHOOL of LAW

Re: Donny Stewart

To whom it may concern:

This letter is written to recommend Mr. Donny Stewart for a judicial clerkship in your chambers. I have had the pleasure of knowing Donny for the past two years as he has matriculated at Wake Forest University School of Law. Donny has been both an excellent student in three of my legal writing classes and an extraordinary teacher's assistant (TA) for two of those classes. Donny ranks in the top 5% of students whom I've taught in my nineteen years of law teaching. He is a natural writer with tremendous lawyering instincts and an indomitable work ethic. Yet despite being extremely talented, he is very humble.

I met Donny in Fall 2021 as a 1L in my Legal Analysis, Writing, and Research (LAWR) I class. LAWR I is Wake Law's first semester legal writing course that introduces first-year law students to the foundational skills necessary for effective legal analysis with a focus on objective writing. He was initially reserved in class, but it became apparent rather quickly that he was a natural writer, meaning that he was astute to the ways in which words fit together to form clear and cogent work products. It also became clear fairly early that he was a solid legal writer. While many students struggle with pivoting to the more technical form of writing that legal writing is, Donny handled the transition with relative ease and ultimately earned a grade of A- in LAWR I. During Spring 2022, he continued to thrive in LAWR II, which is the second semester first-year legal writing course at Wake Law that focuses on persuasive writing skills. Each student is tasked with crafting a trial brief and giving an oral argument. Once again, Donny produced an impressive trial brief and gave a strong oral argument, earning an A- in the class. In Fall 2022, Donny enrolled in my LAWR III (Appellate Advocacy) course, one of Wake Law's upper-level writing courses that tasks the students with constructing an appellate brief and giving an oral argument. Though the work is intensive and the issues more complex than those in the LAWR II trial brief, Donny thrived in the pre-writing and drafting stages of constructing the brief. He worked tirelessly to identify, draft, and perfect his legal arguments and earned an A in the course.

Whether working independently or collaboratively, Donny always works hard (and effectively) to produce a solid work product. In my LAWR I and II classes, I divide the students into smaller groups that are simulative of a law firm. In Appellate Advocacy, the groups are larger, but the premise is the same. This model helps to teach the practicality and the importance of collaborating as an attorney, while ensuring that each student is still accountable for his own work. Donny was able to work collaboratively, willingly contributing during group work, and he was also able to work alone, starting his assignments early and working hard to submit his best work.

Because of his excellent writing skills and his tremendous work ethic, I hired Donny to be one of my LAWR I and II TAs this past academic year. As my LAWR I and II TA, students are tasked with working one-on-one with a group of five first-year students on their formative and summative legal writing assignments. This may include giving oral and written feedback, conferencing, and organizing and conducting writing workshops with my other TAs. The students absolutely loved him, and they all seemed to thrive under his tutelage. Specifically, they expressed great thanks for his help in preparing them for oral argument. So much so that I have also hired him to be a TA for my Appellate Advocacy for Fall 2023. More importantly, this Summer, Donny has been hired to be a judicial law clerk to Judge Loretta C. Biggs, District Court Judge for North Carolina's Middle District. Based on all the foregoing, I have every confidence that he will acquit himself well in her chambers.

As a former state appellate law clerk and staff attorney, I fully appreciate the skillset required to be a successful clerk. I fully believe that Donny has the legal writing skills, the work ethic, and temperament to be an excellent

P.O. Box 7206 | Winston-Salem, NC 27109

judicial law clerk. Given the opportunity to hone those skills in your chambers, I have every confidence that he will go on to achieve great things in the legal profession.

In closing, I highly recommend Donny Stewart for a judicial clerkship in your chambers. As noted above, he possesses all the qualities that a good law clerk must have. If you should require further information, you may contact me at 919-219-5468 or gibsonb@wfu.edu.

Sincerely,

Brenda D. Gibson
Associate Professor of
Legal Analysis, Writing, and Research
Wake Forest University School of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to highly recommend Donny Stewart to serve as a law clerk. I have known Donny since June 2022 when he began working as my research assistant at Wake Forest University School of Law. Donny is very bright, dependable, and eager to learn. He has a great attitude and work ethic; he is hardworking, respectful, and kind to others. I have had a wonderful experience working with Donny as my research assistant, and I have high confidence that he will be an excellent law clerk.

I have consistently been very impressed with Donny's intellect. He is very bright and has strong research and writing skills. I assigned open-ended questions to my research assistants, either through direct email or a google word document that I would update online. My research questions spanned several topics, including caselaw research on criminal and juvenile topics; federalism issues in juvenile law; and the connections between creativity and criminality. In every single research memo that Donny produced, it was very well-researched and written. He searched a wide array of legal databases, books, google scholar, and other sources to provide a comprehensive and thoughtful analysis of the topics. I knew that if Donny took on a project, that I did not have to worry about it or follow up with him. I always learned new things by reading Donny's work. He took initiative, and if he needed further guidance, he reached out to ask clarifying questions.

Donny also has a wonderful demeanor and attitude. I previously served as a law clerk for a federal district court judge in the Central District of California. I remember working closely with the judge, her staff, and my fellow law clerks in close quarters in a fast-paced, high-stressed environment. Donny has the disposition to excel in this environment. He is calm, eager to contribute and learn, respectful, and kind to others. He is responsible and works hard. I have had numerous in-person meetings with Donny and my other research assistants. We met twice a month in my office. I also observed Donny when he was interacting with other students at the LexisNexis table and when we shared lunch together with my other research assistants. He is welcoming, inclusive, and warm to others. I have no doubt that he will treat everyone he meets with respect.

It was without question that I would have continued working with Donny in my research this upcoming academic year. However, I am moving to another law school. I will certainly miss working with Donny. I was not surprised that another professor who had Donny as a student in her seminar class quickly hired him to work as a research assistant.

Thus far, Donny has used his legal training to consistently serve the public. He is passionate about justice and serving those in need. I know Donny will take every opportunity to grow and flourish as a law clerk, and then use his training and skills to continue to better our society.

If there are any questions that I can answer, please do not hesitate to reach me by email at esther.hong@asu.edu, or by phone at (909) 554-0233. Thank you for your time in reading this letter.

Respectfully,

Esther Hong
Associate Professor of Law

Writing Sample

Donny Stewart
New Bern, NC 28562
(252) 474-6904

As a second-year student at Wake Forest University School of Law, I prepared the attached appellate brief as an assignment in my Appellate Advocacy course. The brief was filed in opposition to the grant of summary judgment for a school district that punished a student for exercising his First Amendment rights by wearing a political T-shirt. I have been permitted by my professor to use this appellate brief as a writing sample.

RECORD NO. 22-823

In the
United States Court of Appeals
for the Sixth Circuit

GAVIN PAINTER, by and through his father, DONALD PAINTER,
Plaintiff-Appellant,

v.

AMY DOYLE, SUPERINTENDANT; EDISON MAGNET MIDDLE SCHOOL; and DAYTON PUBLIC SCHOOL SYSTEM,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF APPELLANT

ISSUES PRESENTED

[This section has been omitted to comply with length requirements but can be provided upon request.]

STATEMENT OF THE CASE

[This section has been omitted to comply with length requirements but can be provided upon request.]

SUMMARY OF THE ARGUMENT

[This section has been omitted to comply with length requirements but can be provided upon request.]

STANDARD OF REVIEW

[This section has been omitted to comply with length requirements but can be provided upon request.]

ARGUMENT

This Court should reverse the U.S. District Court for the Southern District of Ohio's summary judgment order because the speech was not offensive, and the speech did not cause a material and substantial disruption. The First Amendment of the U.S. Constitution generally protects the freedom of speech from any governmental intrusion. U.S. Const. amend. I. This protection is still available to students in academic settings as the Supreme Court has held that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969). As such, Title 42, section 1983 of the United States Code serves as a

means for redress against anyone who uses their governmental authority to deprive another of their constitutional rights. 42 U.S.C. § 1983.

It is settled law that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. However, the constitutional rights of students are not coextensive with that of adults in other settings. *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986). For that reason, any analysis of the student's speech rights requires taking the age and maturity of the student and their audience into account. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). The Supreme Court has generally held that only speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" can be limited. *Tinker*, 393 U.S. at 513. In subsequent rulings, the Supreme Court has created exceptions for speech that is "lewd, vulgar, or plainly offensive," *Fraser*, 478 U.S. 675 (1986); speech that is "school-sponsored," *Kuhlmeier*, 484 U.S. 260 (1988); and speech that "advocates for drug usage." *Morse v. Frederick*, 551 U.S. 393 (2007).

As the parties have conceded, Gavin's shirt was neither school sponsored nor a promotion of drug usage, so *Kuhlmeier* and *Morse* are not controlling. This leaves the issues of whether the shirt was "lewd, vulgar, or plainly offensive," under *Fraser*, and whether the shirt caused a "material and substantial disruption," under *Tinker*, to be analyzed in greater detail below.

As this Court has previously held in *Boroff v. Van Wert City Board of Education*, the proper way to analyze the speech is to first determine whether it is

vulgar or plainly offensive under *Fraser*, and if it is not, to determine whether the speech created a threat of substantial disruption that would allow its prohibition under *Tinker*. *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000). Gavin respectfully requests that the Court reverse the summary judgment order because the speech was not lewd, vulgar, or plainly offensive and did not cause a material and substantial disruption, nor was there a reasonable forecast of such. Therefore, the district court erred in granting summary judgment for Defendants because they are not entitled to judgment as a matter of law.

I. The district court erred in concluding that Gavin's speech was "lewd, vulgar, or plainly offensive" under *Fraser* because the speech possessed no sexual undertone and was purely political speech entitled to the highest level of protection.

Gavin's speech was not "lewd, vulgar, or plainly offensive" because it did not have any sexual undertone, as *Fraser* requires, and even under a more expansive definition, the speech was purely political as it addressed pertinent issues. School officials can "prohibit the use of vulgar and offensive terms" as part of their role in teaching students the "fundamental values of 'habits and manners of civility' essential to a democratic society." *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 435 (4th Cir. 2013) (quoting *Fraser*, 478 U.S. at 683, 681). However, schools cannot prohibit speech solely because "society finds the idea offensive or disagreeable." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d. Cir. 2001).

A. The district court erred in concluding that Gavin's speech was lewd, vulgar, or plainly offensive under *Fraser* because there was no sexual undertone to the shirt that was solely criticizing the policy views of Judge Brice.

Gavin's speech was not lewd, vulgar, or plainly offensive as it contained no sexual undertone or any similarly explicit or profane statements. Lewdness, vulgarity, and indecency normally connote sexual innuendo or profanity, and courts have treated "plainly offensive" synonymously. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 327–28 (2d. Cir. 2006). First Amendment cases generally associate these terms with speech that is inherently crude, regardless of specific attitudes about the overall message. *Boroff*, 220 F.3d at 473 (Gilman, J., dissenting).

Speech is not plainly offensive solely because it upsets administrators. *Guiles*, 461 F.3d at 329. In *Guiles*, the student wore a political shirt that depicted the sitting President with drugs and alcohol. *Id.* at 322. The shirt evoked discussion among students and garnered a parent complaint based on differing political views, but otherwise went without incident for two months. *Id.* The student sued after the school forced him to cover the images and words depicting drugs and alcohol. *Id.* at 323. The court held that plainly offensive could not be as broad to apply to any speech that school administrators found to be displeasing or in poor taste. *Id.* at 329. The court reasoned that otherwise, "the rule in *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found the wearing of anti-war armbands offensive." *Id.* at 328.

Through the lens of *Guiles*, Gavin's speech is far from plainly offensive under *Fraser*. Just like the plaintiff's shirt in *Guiles*, Gavin's shirt was clearly criticizing a

public figure in a way that lacked sexual connotations. Also like the plaintiff's shirt in *Guiles*, Gavin's shirt was not seen as offensive by the audience at large. While the plaintiff in *Guiles* received criticism from a student and parent with differing political views, Gavin's shirt was met with initial confusion, rather than opposition. Additionally, the shirt in *Guiles* contained blatant messages depicting the President using alcohol and drugs. In contrast, Gavin's shirt only contained words criticizing a retired judge's policy views and an image of a migrant child. *But see Fraser*, 478 U.S. at 684–85 (holding that speech is plainly offensive when it contained a sexual innuendo, was given at a mandatory assembly, and there were prior indications of its inappropriateness); *see also Pyle ex rel. Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1994) (finding that speech was plainly offensive when the shirts contained "overt sexual tag line[s]").

Courts in some contexts have found shirts to be plainly offensive; however, that determination did not rely solely on a misinterpretation of the shirt's meaning. *See Broussard ex rel. Lord v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992) (concluding that a shirt reading "Drugs Suck" was inappropriate when it received immediate criticism from administration and the term could be understood by the public at large to have a sexual meaning). Here, Gavin's shirt did not receive the same level of collective disdain from a reasonable interpretation that the shirt in *Broussard* did. If the Court allows Doyle to limit Gavin's speech, even though the shirt contained no sexual undertone and was never understood to contain such, it will effectively allow school administrators to censor any speech that garners

criticism. Therefore, to be consistent with the holding in *Fraser*, the Court should reverse the summary judgment order because Gavin's shirt contained no sexual innuendos or perverse statements in its critique of Judge Brice's political views.

B. The district court erred in concluding that Gavin's speech was plainly offensive because, even under the broad construction of *Fraser*, the speech was solely political and not understood in a way that advocated harm.

Under *Boroff*, which uses a broader interpretation of plainly offensive, Gavin's speech was not plainly offensive because the speech was solely a form of political protest that was not understood to advocate harm. Schools are vital environments that provide education about diversity and how to approach and express diversity responsibly. *Barber ex rel. Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d. 847, 858 (E.D. Mich. 2003). This allows schools to limit student speech considered inconsistent with its basic educational mission. *Kuhlmeier*, 484 U.S. at 266. However, the prohibition of speech cannot rest solely on the listener's disagreement with or misunderstanding of the speaker's viewpoint, especially if the speech was never meant to advocate or provoke harm. *Morse*, 551 U.S. at 434–37 (Stevens, J., dissenting). There must be more than hurt feelings, offense, or resentment to render the speech unprotected. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264–65 (3d. Cir. 2002); *see Chandler v. McMinnville Sch. Dist.,* 978 F.2d 524, 530 (9th Cir. 1992) (holding that "insulting, disrespectful or even threatening" language is not lewd, vulgar, or plainly offensive when context makes an alternative interpretation more likely).

Speech cannot be barred solely because of its "implicitly" offensive nature. *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 645 (D.N.J. 2007). In *DePinto*, two fifth-grade students wore buttons with an image of the Hitler Youth in protest of the school uniform policy. *Id.* at 635. Despite the lack of Nazi symbols and the blurriness of the image, the school suspended the students on the grounds that the images were plainly offensive. *Id.* The court found that while the image could be interpreted as insulting or in poor taste, it fell short of being plainly offensive to warrant its suppression. *Id.* at 645. The reasoning of the court focused on the lack of symbols showing that the image was of the Hitler Youth, stating that "the young men might easily be mistaken for a historical photograph of the Boy Scouts." *Id.*

Here, similar to the plaintiffs in *DePinto*, Gavin's speech also falls short of being plainly offensive. Like the buttons in *DePinto*, Gavin's shirt was purely a form of political protest. The buttons in *DePinto* were worn to protest the school's uniform policy. Similarly, Gavin's shirt was an act of protest against the policy views of Judge Brice. Also, both plaintiffs in *DePinto*'s speech and Gavin's lack any indicia of offensive content. There were no symbols that connected the image to Nazism in the same way that there were no indicators that connect Gavin to the Mafia. However, it is indisputable that the term "ice" pales in comparison to the messages espoused by the Nazis, so the allowance of the more "offensive" message with a younger audience is indicative of the importance of political speech rights in all academic settings, regardless of age.

Additionally, like the buttons in *DePinto*, Gavin's shirt was not connected to a violent group. In *DePinto*, the buttons did not show any prominent connection to the Nazis. The court noted that the image could have been mistaken as a historical image of the Boy Scouts. Similarly, Gavin's shirt showed no affiliation with the Mafia or similar violent groups to give merit to Doyle's interpretation of "ice." The sources consulted by Doyle both showed kill as the last definition, and some iteration of chill, which was the meaning posited by Gavin, as the first. It is also generally well-known that I.C.E. is the organization connected with immigration policy. Every party to whom Gavin was able to explain the meaning of the shirt readily accepted his interpretation, so Doyle's misinterpretation of the message, due to her inexperience with Edison's students, was an insufficient basis to limit the speech.

Furthermore, as a case decided by this Court, *Boroff* may seem instructive; however, that case is readily distinguishable. The speech in *Boroff* conflicted with the school's educational mission, while Gavin's speech embodied it. *See Boroff*, 220 F.3d at 470–72 (holding that Marilyn Manson shirts were plainly offensive because they implicitly promoted drug usage, racism, and other demoralizing messages that conflicted with the school's educational mission). Here, Edison's educational mission promotes students going beyond the classroom material and advocating their views in respectful ways; however, the school's first instinct was to punish Gavin for doing just that. Gavin's interest in immigration policy arose from a classroom discussion,

and he chose the most respectful and passive form of political advocacy at his disposal: a shirt encouraging the judge to reconsider his policy views.

In addition, the Supreme Court has provided clear guidance that rejects the broad definition of plainly offensive that *Boroff* employed. *See Morse*, 551 U.S. at 409 (concluding that the holding in *Fraser* cannot be "read to encompass any speech that could fit under some definition of 'offensive'"). Therefore, this Court should reverse the summary judgment order because Gavin's shirt was purely political speech and was not understood by any parties to advocate harm to anyone.

II. [This section has been omitted to comply with length requirements but can be provided upon request.]

CONCLUSION

For the reasons stated herein, Plaintiff-Appellant respectfully requests that the Court reverse the summary judgment order.

This the 12th day of October, 2022.

Applicant Details

First Name	**Jacob**
Middle Initial	**H.**
Last Name	**Sugarman**
Citizenship Status	**U. S. Citizen**
Email Address	**jacob.sugarman@duke.edu**
Address	**Address** Street **27 Saturn Ct** City **Syosset** State/Territory **New York** Zip **11791** Country **United States**
Contact Phone Number	**5164580223**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2020**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Duke Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garrett, Brandon
bgarrett@law.duke.edu
919-613-7090
Root Martinez, Veronica
martinez@law.duke.edu
919-613-8540
Brod, Nick
nicholas.brod@duke.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1420 Broad St
Durham, NC 27705

June 10, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my strong interest in clerking for you during the 2024-25 term. I am a third year law student at Duke Law School and expect to receive my J.D. in May of 2024. I will be available to clerk any time after graduation.

I have the research, editing, and writing skills to excel as your clerk. As a member of the Duke Law Journal, I have enjoyed the opportunity to focus my editing skills while broadening my knowledge of substantive law. Furthermore, my experiences with Duke's Appellate Practice course and Moot Court Board have sharpened my analytical skills and developed my ability to piece together complex bodies of law. I was particularly proud to have received a 4.0 in Appellate Practice, where I used my skills to write an appellate brief and conduct oral argument in front of a federal judge.

Enclosed are copies of my resume, Duke Law and undergraduate transcripts, and the brief I wrote for Appellate Practice. Also enclosed are letters of recommendation from North Carolina Assistant Solicitor General Nick Brod, who co-taught the Appellate Practice course, Professor Brandon L. Garrett, and Professor Veronica Root Martinez. Please let me know if you need any additional information. Thank you for your consideration.

Sincerely,

Jacob Sugarman

JACOB SUGARMAN
1420 Broad St, Durham, NC 27705 | jacob.sugarman@duke.edu | (516) 458-0223

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2024
GPA: 3.81
Honors: Recognized as within the top 5% of the Class of 2024
Steven R. Shoemate Scholarship
Alexandra D. Korry L'86 Civil Rights Fellowship (Spring 2022)
Dean's Award for Ethics & Professional Responsibility (Fall 2022)
Activities: Duke Law Journal
Moot Court Board — Quarterfinalist in the Hardt Cup Tournament (2022)
Innocence Project
Fair Chance Project

The University of Michigan, Ann Arbor, MI
Bachelor of Arts in Philosophy, Politics, and Economics, April 2020
Bachelor of Music in Bassoon Performance, *with honors*, April 2020
GPA: 3.7
Activities: Turn Up Turn Out
Campus Election Engagement Project

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP
Summer Associate, May – August 2023

Michigan State Appellate Defenders Office, Detroit, MI
Legal Intern, June – August 2022
- Researched appellate issues and developed legal theories for ongoing criminal appeals.
- Drafted memos summarizing procedural and substantive law for the Direct Appeals Unit.
- Worked with the Juvenile Lifer Unit to prepare for resentencing hearings.

Hudson PC, Ann Arbor, MI
Legal Evidence Specialist, August 2020 – March 2021
- Drafted and edited immigration petitions for researchers, professors, and business leaders.
- Reviewed legal documentation and communicated with clients to obtain evidence.

University Musical Society, Ann Arbor, MI
Patron Services Representative, November 2016 – April 2020
- Sold subscriptions, group sales, and individual tickets and managed operational data.
- Acted as the public face of UMS by resolving patron requests and accessibility issues.

DNC Organizing Corps 2020, Oakland County, MI
Field Organizer, June – August 2019
- Acted as head of volunteer outreach and training for State House Districts 43 and 44.
- Organized canvass launches, phone banks, and volunteer training events.

Campus Election Engagement Project, Ann Arbor, MI
Fellow, April – November 2018
- Created and implemented an action plan to increase student voter turnout.
- Organized voter registration and information events with regional leaders.

ADDITIONAL INFORMATION

- Completed a thesis project on interdisciplinary performance for my B.M. degree (2020).

DUKE UNIVERSITY - Unofficial Transcript

Name: **Jacob Herbert Sugarman** **6/10/2023**
Student ID: **2319667**

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	3.8	GRD
LAW	140	CRIMINAL LAW	4.500	3.3	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	3.9	GRD

Term GPA: 3.666 Term Earned: 13.500

Cum GPA: 3.666 Cum Earned: 13.500

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.9	GRD
LAW	130	CONTRACTS	4.500	3.6	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.8	GRD
LAW	170	PROPERTY	4.000	3.9	GRD

Term GPA: 3.797 Term Earned: 17.000

Cum GPA: 3.739 Cum Earned: 30.500

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.739 Cum Earned: 30.500

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	240	ETHICS PROF RESPONSIBILITY	3.000	4.2	GRD
LAW	242	SOCIAL JUSTICE LAWYERING	2.000	4.0	GRD
LAW	245	EVIDENCE	4.000	4.0	GRD
LAW	285	LABOR RELATIONS LAW	3.000	3.8	GRD
LAW	405	APPELLATE PRACTICE	3.000	4.0	GRD

Term GPA: 4.000 Term Earned: 15.000

Cum GPA: 3.825 Cum Earned: 45.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Jacob Herbert Sugarman** **6/10/2023**
Student ID: **2319667**

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	342	FEDERAL COURTS	5.000	3.8	GRD
LAW	420	TRIAL PRACT	3.000	3.9	GRD
LAW	429	CIVIL JUSTICE CLINIC	4.000	3.8	GRD
LAW	555	LAW AND FINANCIAL ANXIETY	2.000	3.4	GRD

Term GPA: 3.764 Term Earned: 14.000

Cum GPA: 3.810 Cum Earned: 59.500

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.810 Cum Earned: 59.500

Law School Career Earned

Cum GPA: 3.810 Cum Earned: 59.500

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Sugarman

Dear Judge Walker:

I write to recommend Jacob Sugarman for a judicial clerkship in your chambers. He has an extremely strong record at Duke Law, which has continued to grow stronger in each semester. The curve at Duke Law is extremely demanding, and the grading more fine-grained than at other top law schools. Jacob is collegial, creative, a beautiful writer, and has a deep commitment to public interest work, having taken on challenges in a number of different areas, from complex appellate work, to immigration work, to post-conviction work on innocence-related claims. He would be such a delight in chambers and I recommend Jacob in the strongest possible terms.

I first came to know Jacob in my evidence course in fall 2022. Jacob wrote one of the best exams in the course and received a perfect 4.0 grade in a very large and competitive class. I was not surprised at this performance. Jacob asked excellent questions throughout the course and was easily one of the most engaged students. I deeply enjoyed my conversations about the material with Jacob; these were a highlight of the fall course. Jacob loves thinking carefully about litigation, evidence rules, and what policy choices and theories structure those rules. Jacob is an excellent speaker and oral advocate and was a quarterfinalist in the Hardt Cup Tournament during his first year.

Jacob has done a range of other impressive research and public interest work at Duke Law and has received a number of awards and honors during his time here. Jacob received a civil rights fellowship last spring, and this past fall received the Dean's Award for Ethics and Professional Responsibility. Jacob's involvement in law school activities have ranged from casework with the student Innocence Project, pro bono record expunction work, to participating in the moot court board and the Duke Law Journal. Jacob has wide ranging experience before law school, majoring in both Philosophy and Bassoon, working for the Universal Music Society at the University of Michigan during college, paralegal work, and current work in the Civil Justice Clinic at Duke Law. This experience has added a level of maturity to Jacob's work.

In short, Jacob is an academically gifted student, a diligent worker, a strong writer, and a very gifted and personable communicator. Jacob is committed to litigation and public sector work and has taken on a variety of perspectives and experiences, working as a paralegal, in a state appellate defender's office, and at a large firm. Jacob is balanced, collegial, hardworking, and would be a great asset in Chambers. Please feel free to contact me at (919) 613-7090 if you would like to discuss his application, and I thank you for considering it.

Very truly yours,

Brandon L. Garrett
L. Neil Williams, Jr. Professor of Law and
Director, Wilson Center for Science and Justice

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Jacob Sugarman

Dear Judge Walker:

I write to recommend Jacob Sugarman to serve as a law clerk in your chambers. I am confident that his experiences in law school have prepared him to perform the research, writing, and other duties necessary to be a successful law clerk. Additionally, his easy-going personality paired with an extraordinary work ethic will make him a valuable addition to your chambers.

Jacob was a student in my Fall 2022 Ethics and Professional Responsibility course. This is a large lecture course, but Jacob stood out from the very beginning. He was focused, asked excellent questions, understood the concepts and their nuance, and was a valuable member of the class community. Jacob received the highest grade in the class, and I was impressed with his ability to analyze the issues presented on the exam. Importantly, my exam is performed under time pressure and has word count limitations. Jacob masterfully identified the most relevant arguments to make for each issue presented and went on to write cogent and persuasive responses. In my over a decade of law teaching, his is one of the very best examinations I have had the pleasure to read.

On a more personal note, I have had the opportunity to interact with Jacob more informally outside of the classroom. He easily interacts with his classmates, and he happily participates in conversations across a wide range of topics. We spoke of his genuine interest in clerking as well as his long-term career goals. Jacob understands that a clerkship will provide him with an invaluable learning opportunity that will assist him in his future efforts within the legal profession. Specifically, Jacob hopes to pursue a litigation-focused practice, and he believes clerking will provide him with experiences, information, and skills that will assist him over the course of his career. My strong sense is that he will eventually end up in the government or non-profit sector.

Based on my interactions with Jacob inside and outside of the classroom, I have concluded that he is a hard-working, intellectually curious, and driven student. Jacob will complete assignments with a positive, unpretentious attitude. He is smart enough to know when he should ask more questions and driven enough to work hard to find the right answers. In short, Jacob will be an asset to those who work with him.

If you have any further questions regarding Jacob, please do not hesitate to contact me.

Sincerely yours,

Veronica Root Martinez
Professor of Law

Veronica Root Martinez - martinez@law.duke.edu - 919-613-8540

NICHOLAS S. BROD
DEPUTY SOLICITOR GENERAL

(919) 716-6984
nbrod@ncdoj.gov

February 13, 2023

Re: Jacob Sugarman
Clerkship recommendation

Dear Judge:

I write in support of Jacob Sugarman's application for a clerkship in your chambers.

I am a Deputy Solicitor General in the North Carolina Department of Justice and a Lecturing Fellow at Duke Law School. Jacob was a 2L student in my Fall 2022 Appellate Practice class, which I co-taught with two other colleagues in our state SG's office. I clerked for a federal appellate judge and a federal district judge after law school, so Jacob has asked me to comment on his performance in light of my experiences as a judicial clerk. I can also comment on Jacob's performance relative to that of other law students.

Jacob was a standout student in our Appellate Practice course. The class is an upper-level seminar that introduces students to appellate advocacy and the appellate process. The central project entails each student briefing one side of a case and presenting oral argument for that side before a federal court of appeals judge. We based the case on a recent en banc decision from a circuit court that raised complex, novel issues of constitutional and statutory law.

Jacob received the second-highest grade in the class. That accomplishment is particularly impressive given that more than half of the students in the class were on law review, with many going on to clerk for federal judges after graduation.

Jacob excelled on both his brief and his oral argument. As for the brief, the court of appeals judge who evaluated Jacob's work called it a "great brief" that was "very well argued." We shared that view. First, the brief took complex areas of law and made them simple, explaining difficult legal doctrines in a clear, logical, and organized fashion. But Jacob went beyond merely describing the law. His brief also explained the underlying reasons for seeing the doctrine his way, rather than merely asserting that cases stood for a particular rule. The result was an unusually sophisticated argument focused on both precedent and first principles. That ability to analyze case law without losing sight of the bigger picture would make him a reliable collaborator on challenging cases.

Second, the brief also reflected thorough legal research. The brief was an open-universe assignment, and we imposed no limits on the scope of students' research. Jacob marshalled an impressive set of cases, statutes, agency regulations, and even historical materials to support his arguments. His review of the factual record was similarly exhaustive. We gave students access to the case's nearly 3,000-page joint appendix. Throughout his brief, Jacob routinely incorporated various facts from across the appendix to make creative arguments that few others saw. The kind of comprehensive research that Jacob demonstrated in his brief is what I strived for when I was a clerk working on bench memos or draft opinions with my judges.

Third, Jacob's sentence-level writing was consistently first-rate. He used short, clear topic sentences to great effect. He incorporated transitions of logic both between and within individual paragraphs. And his word choices were appropriate and professional: the brief made a persuasive argument without being unnecessarily argumentative.

Jacob's oral argument was just as successful. Like his written work product, Jacob's oral communication was unusually clear and well-organized, even under tough questioning from a sitting federal appellate judge, who later praised Jacob's performance. I am confident that Jacob would be able to have constructive conversations about cases as a law clerk.

In addition to Jacob's substantive performance during the class, Jacob was also just great to work with. I interacted with Jacob regularly over the course of the semester as he drafted his brief and prepared for oral argument. Jacob is mature and professional but still has a warm demeanor. And I was particularly impressed by how Jacob sought out constructive criticism from me on his brief and oral argument, even though he received such a high grade in the class. Jacob's openness to feedback and drive to improve will make him an effective team player in chambers.

Jacob has all the qualities of an excellent law clerk. He has my enthusiastic support, and I recommend him to you without reservation. If I can provide any further information, please feel free to contact me.

Sincerely,

/s/ Nicholas S. Brod

Nicholas S. Brod
Deputy Solicitor General
N.C. Department of Justice
(919) 716-6984
nbrod@ncdoj.gov

POST OFFICE BOX 629, RALEIGH, NC 27602-0629

JACOB SUGARMAN
1420 Broad St, Durham, NC 27705 | jacob.sugarman@duke.edu | (516) 458-0223

Writing Sample

This is an appellate brief written for my Appellate Practice course in Fall 2022. The problem was based on *Charter Day School v. Peltier* and I was assigned to write the Petitioner's Brief. I've lightly edited the brief for clarity and space.

No. 22-000

In the Supreme Court of the United States

CHARTER DAY SCHOOL, INC., ET AL.,
Petitioners,
v.

BONNIE PELTIER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

Jacob Sugarman
Counsel of Record

Duke University School of Law
210 Science Drive
Durham, NC 27708
(516) 458-0223
Jacob.sugarman@duke.edu

QUESTIONS PRESENTED

Charter Day School is a non-profit corporation that was granted a charter by North Carolina to operate a public school. Although the school is open to all public school students and receives state funding, no student must attend Charter Day. Further, North Carolina allows the school to implement novel educational methods and student policies with minimal state oversight. Did the school act under color of state law by implementing a gender-specific dress code policy?

Additionally, Charter Day receives federal funds and is governed by Title IX. However, Title IX does not explicitly mention gender-specific dress codes, and the Department of Education has stated that such codes are for local determination. Does interpreting Title IX to prohibit gender-specific dress codes violate the Spending Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

INTRODUCTION

By adopting the Charter School Act, North Carolina empowered charter schools to innovate around the many problems plaguing traditional public schools. One such school, Charter Day, quickly succeeded where many traditional public schools had failed. Since the school was largely independent from state control, Charter Day could freely experiment with novel solutions to the educational crisis. For example, Charter Day centered traditional western values to discourage violence and bullying. And, central here, Charter Day implemented a dress code policy to keep order and instill respect. As a result, Charter Day's students have thrived. But today, the Court will decide whether Charter Day's successful experiment will be burdened by federal intervention and litigation costs.

And the consequences will extend far beyond Charter Day alone. Public charter schools succeed because they innovate freely, without the heavy hand of the state getting in the way. But calling public charter schools state actors would rip away that independence. Across the country, public charter schools would be forced to homogenize. Innovative methods would be axed in favor of standardized approaches proven immune from § 1983 litigation. And without the ability to choose truly independent public schools, students and families will suffer most.

As if that wasn't enough, the Court will also decide whether public charter schools will be accountable for unforeseeable expansions of Title IX. Depending on

the outcome, public charter schools may be forced to forego crucial federal funds altogether. After all, no authority — not the Department of Education, Congress, or this Court — suggests that Title IX covers gender-specific dress codes. Nevertheless, the Court is asked to impose this surprise condition on all public charter schools. Moving forward, schools like Charter Day would be forced to think twice before accepting crucial federal funds. What other surprise conditions might the federal government spontaneously impose? Are federal funds worth the risk?

Few things are more important to the future of our country than education. North Carolina chose to encourage innovative schools like Charter Day, to the benefit of families across the state. The Court should not get in the way.

As such, we respectfully ask that the judgement of the court of appeals be reversed.

STATEMENT OF THE CASE

A. North Carolina encourages the creation of charter schools to address gaps in the state's traditional public school system.

In 1996, North Carolina passed the Charter School Act to "provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools." N.C. Gen. Stat. § 115C-218. The legislature sought to empower charter schools to "improve student learning" and implement "different and innovative teaching methods" not available in traditional public schools. *See Id.* § 115C-218(a)(1), (3) (outlining the legislature's goals). Today, by all accounts, the legislature has achieved this goal — North Carolina boasts hundreds of charter schools, each providing unique educational opportunities to their students. Pet. App. 85.

But charter schools have not supplanted the traditional public school system entirely. As such, students eligible to attend public school in North Carolina are never required to attend a charter school. N.C. Gen. Stat. § 115C-218.45(a)–(b). Instead, parents and students are free to decide whether the unique opportunities provided by charter schools are the best fit for their individual needs. *See Id.* (allowing but not requiring charter school attendance).

Indeed, recognizing the significant differences between charter schools and traditional public schools, the legislature decided to adopt distinct administrative procedures and regulatory

frameworks for the two. Thus, despite being labeled 'public' schools under state law, charter schools are operated by private, nonprofit corporations rather than local public school boards. *Id.* § 115C-218.15(a)–(b). In fact, unlike traditional public schools, local school boards have no influence over the operation of charter schools. *See Id.* § 115C-218.15(d) (empowering private boards of directors). Instead, the legislature empowered each charter school's board of directors to independently determine each school's budget, curriculum, and operating procedures. *Id.*

And unlike traditional public schools, which are regulated by statutes applicable to local boards of education, charter schools are governed by their charter with the state. *Id.* §§ 115C-218.10, 115C-218.15(c). Under this framework, charter schools have considerable freedom from state oversight and can experiment and break new pedagogical ground. Indeed, through this arrangement, the legislature gave charter schools extensive authority to implement their own pedagogical methods and policies on student conduct and discipline. *See Id.* §§ 115C-218.60, 115C-390.2(a) (requiring, but not supervising, student discipline policies); *See also Id.* § 115C-218.10 (exempting charter schools from school board rules). The state does not supervise the content of these methods or polices. *Id.* And the state has explicitly disclaimed liability "for any acts or omissions of [a] charter school," further highlighting their hands-off approach. *Id.* § 115C-218.20(b).

That said, charter schools remain accountable to the people of North Carolina through their charter

agreements with the state. For example, a charter school's agreement may incorporate federal and state constitutional provisions, applicable civil rights statutes, and health and safety regulations. *See* J.A. 225 (Charter Day's agreement). And North Carolina may revoke a charter agreement if a charter school violates the agreement or otherwise underperforms. N.C. Gen. Stat. § 115C-218.95. So, charter schools have good reason to comply with the terms of their charter agreements. After all, charter schools lose access to considerable public funding when their charter is revoked, among other penalties. *See Id.* §§ 115C-218.105(a)–(c), 115C-218.95 (tying state funding to valid charter agreements).

B. Charter Day School obtains a charter from North Carolina and successfully provides innovative educational programming for decades.

In 1999, Charter Day School was incorporated as a nonprofit corporation. Pet. App. 111. The school sought to provide a "disciplined, caring classroom environment that emphasizes traditional values and direct instructional methods" to the rural community of Brunswick County, North Carolina. J.A. 108. And the school hoped to ameliorate the significant school overcrowding problems facing the area at the time. J.A. 111, 209–10. So, one year later, the school applied for a charter pursuant to the Charter School Act and was approved. Pet. App. 8. Since then, North Carolina has repeatedly renewed the school's charter. J.A. 2716.

From the start, the school offered innovative educational methods not otherwise available in Brunswick County. *See* J.A. 111 (outlining Charter Day's educational philosophy and goals). For example, the school employs a unique "direct instruction" pedagogy which has been shown to "dramatically improve learning over other teaching methodologies." J.A. 114; *See generally* J.A. 191–93 (summarizing the method). And the school has adopted a uniform approach to curriculum design, teaching a "classical curriculum" that highlights the work of preeminent western thinkers like Chaucer, Shakespeare, Galileo, and Caravaggio. J.A. 80. To compliment this "traditional" approach, students at the school are required to take a code of conduct pledge and abide by classical virtues like "prudence, justice, fortitude, and temperance." J.A. 80–81, 111.

The school views its uniform dress code policy as central to this educational philosophy. The school implemented the dress code to "instill discipline and keep order." J.A. 114. The school based this decision on the experience of schools around the country that have successfully reduced behavioral problems with similar policies. *Id.*

Both male and female students must adhere to the dress code. Pet. App. 111–12. All students must wear white or navy-blue tops, which must be tucked in. *Id.* And all students are required to wear khaki or blue bottoms with closed-toed shoes. *Id.* Students must also follow some gender-specific guidelines. *Id.* For example, male students must wear a belt and are forbidden from wearing jewelry. *Id.* at 112.

Furthermore, while male students are required to wear pants or shorts, female students must wear skirts, jumpers, or skorts. *Id.*

Of course, the school drafted the dress code with practicality in mind. Thus, the school allows female students to wear socks or leggings for additional warmth on colder days and waives portions of the dress code on special occasions. *Id.* Additionally, on days with physical education, both male and female students have different uniforms to provide greater freedom of movement. *Id.* Female students, for example, are permitted to wear gym shorts or sweatpants on such days. *Id.* And the school enforces the dress code with a delicate hand. Although the school notifies the parents when a student violates the dress code, this practice is intended to be informative rather than putative. *Id.* Similarly, although a student may be pulled from class to obtain compliant attire, the school has never expelled a student for a uniform policy violation. *Id.*

To be sure, the school is unique. Indeed, the school recognizes that "not all parents and students will be attracted" to their pedagogical methods and educational philosophy. J.A. 111. At first, that prediction proved correct — the school enrolled only 53 students for its inaugural year. J.A. 2716. Over time, however, Brunswick County grew to appreciate the unique educational opportunities provided by the school. Today, the school serves over 900 elementary and middle school students. *Id.* In fact, the school has proven so popular that potential students must apply

through a "lottery" system. *See* J.A. 84–5 (outlining the lottery process).

C. Bonnie Peltier moves to Winnabow, NC to be close to Charter Day, voluntarily enrolls her daughter, and brings the present lawsuit.

In the mid-2010's, Bonnie Peltier decided to move to Winnabow, NC to "be close to [the school]" and take advantage of the school's "unique educational benefits." J.A. 39, Pet. App. 9. So, upon arriving in Winnabow, Peltier voluntarily enrolled her daughter. Pet. App. 61. During an orientation event, Peltier asked about the dress code and school officials directed her to contact the school's founder, Baker Mitchell, for more information. *Id.* Peltier emailed Mitchell, noting that she "underst[ood] the uniform policy and the premise behind it," but asking about the rationale behind the skirts requirement in particular. J.A. 71.

In response, Mitchell highlighted the school's mission to "instill and respect traditional values" in the face of contemporary problems like bullying, sexual harassment, and gun violence. J.A. 70. Mitchell explained the skirts requirement was implemented as part of the dress code to help "establish an environment in which our young men and women treat one another with mutual respect." *Id.* And Mitchell noted that the dress code, including the skirts requirement, had successfully established "a focused learning environment with respectful, dignified student relationships" within the school. *Id.*

Peltier responded by suing the school on her daughter's behalf. J.A. 34–5. Peltier, along with two other parents, challenged the dress code as unlawful under Title IX and the Equal Protection Clause. *Id.* In particular, Peltier alleged the skirts requirement created practical problems for female students including limited mobility, distraction in class, and inadequate warmth. Pet. App. 62. And Peltier expressed concerns about the requirement's psychological ramifications, suggesting that the school was reinforcing antiquated gender stereotypes. *Id.* at 63. The school countered by explaining the pedagogical purpose of the requirement — to promote the classical virtue of chivalry and encourage the proper treatment of young women. *Id.* Furthermore, the school pointed out the extraordinary academic and extracurricular success of their students and credited the dress code, in part, for that success. *Id.*

The District Court for the Eastern District of North Carolina delivered a mixed ruling. *Id.* The district court granted Peltier's summary judgement motion on the Equal Protection claim but granted the school's summary judgement motion on the Title IX claim. *Id.* On appeal, a Fourth Circuit panel reversed the district court's judgement on both claims. *Id.* at 12. However, the 4th Circuit subsequently vacated that decision and considered the appeal en banc. *Id.*

Ultimately, the 4th Circuit affirmed the district court's entry of summary judgement for Peltier on the Equal Protection claim but vacated the entry for the school on the Title IX claim. *Id.* at 7. For the Equal Protection claim, the 4th Circuit held the school had

acted under color of state law. *Id.* at 29, 34. In support, the 4th Circuit stressed the school's 'public' statutory designation. *Id*. at 23–24. Furthermore, the 4th Circuit reasoned that North Carolina had delegated constitutional obligations to Charter Day and that the school had assumed a historically exclusive state function. *Id.* at 22, 26. For the Title IX claim, the 4th Circuit ruled that Title IX unambiguously reaches dress codes. *Id.* at 39, 43. In doing so, the 4th Circuit focused on the text of Title IX without engaging in a Spending Clause analysis. *Id.* at 37–41.

Multiple judges dissented from the 4th Circuit decision. *Id.* at 57, 84. On the Equal Protection claim, Judge Quattlebaum, joined by five judges, criticized the majority opinion for "misconstrue[ing] and ignor[ing] guidance from the Supreme Court and all of our sister circuits" addressing similar issues. *Id.* at 57. Specifically, Judge Quattlebaum argued that the majority failed to follow this Court's decision in *Rendell-Baker v. Kohn*, under which Charter Day could not be considered a state actor. *Id.* at 80–81. Consequently, the 4th Circuit erroneously "transform[ed] all charter schools . . . . into state actors" and severely curtailed the "innovative alternatives to traditional public education envisioned by North Carolina." *Id.* at 57–58.

Judge Wilkinson, joined by two judges, authored an additional dissent on the Title IX claim. *Id.* at 84. Judge Wilkinson highlighted the Department of Education's decades-old guidance finding "no indication" that Congress intended to regulate dress code policies through Title IX. *Id.* at 95–6.

Considering this guidance alongside the statutory text, Wilkinson "struggle[d] to see" how Title IX unambiguously reaches dress codes. *Id.* at 97–98. And Wilkinson viewed this ambiguity as a serious problem, considering the "central concern" of ensuring recipients of federal funds have notice of federally imposed conditions. *Id.* at 96. So, Wilkinson argued that the 4th Circuit's interpretation of Title IX violated the Spending Clause. *Id.* at 100.

SUMMARY OF THE ARGUMENT

Charter Day School did not act under color of state law by implementing the uniform dress code policy. Although the state action inquiry is complex, the Court has provided clear guidance in the school context. Indeed, the Court has stressed that public funding is not dispositive, regulation is insufficient without coercion, and that the activity in question must be the historic, exclusive prerogative of the state. North Carolina did not coerce Charter Day to implement the policy. Further, North Carolina was not the historic, exclusive source of alternative education. Thus, Charter Day is not a state actor.

And the Court should not accept the 4th Circuit's arguments to the contrary. For one thing, North Carolina has not delegated its constitutional obligations to Charter Day. Although North Carolina is constitutionally required to provide a uniform system of free public education, it has not abdicated that responsibility to Charter Day. Additionally, the 4th Circuit improperly relied on Charter Day's statutory designation, an approach which this Court has foreclosed.

Countervailing reasons also weigh against finding state action. North Carolina has a sovereign right to create educational programs outside of direct state control. Furthermore, parents have the inherent right to direct their children's education by choosing independent schools like Charter Day. The Court should not limit North Carolina's sovereign rights, nor parental freedom of choice.

And the Court cannot expand Title IX to prohibit Charter Day's dress code without violating the Spending Clause. Congress cannot condition federal funds unless it does so unambiguously. Here, the regulatory scheme indicates that Title IX does not reach dress codes. Further, the statutory text of Title IX is ambiguous with respect to gender-specific dress codes. Thus, the Court should hold Title IX does not reach Charter Day's policy.

Thus, the judgement of the court of appeals should be reversed.

ARGUMENT

I. Charter Day is not a state actor.

Peltier argues that the school is a state actor subject to liability under § 1983. However, § 1983 does not "regulate private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted). Indeed, privately owned corporations are generally not state actors subject to liability under § 1983. *See, e.g.*, *Manhattan Cmty. Access Corp. v.*

Halleck, 139 S. Ct. 1921, 1926 (2019) (private cable provider); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 346, 358–59 (1974) (private utility company). Thus, to win, Peltier must overcome this presumption and demonstrate the school acted "under color of" state law when implementing the uniform dress code policy. *See* 42 U.S.C. § 1983 (establishing the state action requirement).

The Court has recognized limited situations under which a private actor's conduct may be considered state action. To determine if such a situation exists, the Court asks whether "the alleged infringement of federal rights [is] fairly attributable to the State[.]" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (internal quotation marks omitted). Thus, to designate private conduct as state action, the Court must establish a "sufficiently close nexus" between the challenged private conduct and the state. *Jackson*, 419 U.S. at 351.

This inquiry is fact specific and lacks "rigid simplicity." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Instead, courts should consider a "range of circumstances" to determine if state action is present. *Id.* For example, this Court has found state action when private actors exercise some power "traditionally [and] exclusively reserved to the State." *Jackson*, 419 U.S. at 352. Alternatively, state action may exist when the government compels or coerces a private entity to take a particular action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Still, the Court is clear that "no one fact can function as a necessary condition across the board

for finding state action; nor is any set of circumstances absolutely sufficient." *Brentwood*, 531 U.S. at 295–96.

Despite this analytical flexibility, courts recognize the importance of closely guarding the line between state and private action to "preserv[e] an area of individual freedom by limiting the reach of federal law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). After all, without the state action requirement, "private parties could face constitutional litigation whenever they [rely on state rules]" to guide their behavior. *Id.* at 937. Further, courts use the doctrine to avoid the unfair imposition of responsibility on the state for conduct it could not control. *Id.* at 936. Thus, even when private conduct could arguably be attributed to the state, "countervailing reason[s]" might counsel against exposing a private entity to a § 1983 claim. *Brentwood*, 531 U.S. at 295–96.

Here, the Court should hold Charter Day is not a state actor. First, the Court has established binding precedent in the school context. This precedent demonstrates that Charter Day has not acted under color of law. Next, the 4th Circuit's arguments to the contrary have little merit. Finally, countervailing reasons counsel against finding state action.

A. This Court has provided clear guidance in the school context.

Although the state action doctrine is undeniably complicated, the Court has already established clear and controlling guidance in the school context. In *Rendell Baker v. Kohn*, the Court considered whether

a publicly funded school for students with behavioral problems acted under color of law when discharging certain employees. *Rendell-Baker*, 457 U.S. at 831–32. The school was operated by a board of directors with no public affiliation, received at least 90% of its operating budget from the state, and was subject to extensive state regulation. *Id.* at 831–34. The contacts between the state and the school were extensive — local public school committees referred students, paid their educational costs, and certified their diplomas upon graduation. *Id.* Still, despite these significant contacts with the state, the Court ruled the school was not a state actor. *Id.* at 837.

First, the Court noted that significant public funding is largely unimportant to the state action inquiry. *Id.* at 840–41. The Court drew an analogy between the school and other private organizations that rely on government contracts for their business. *Id.* Like private businesses that negotiate government contracts to build public roads or bridges, the school did not "become [a state actor] by reason of significant or even total engagement in performing public contracts." *Id.* Thus, the Court afforded little weight to the school's significant public funding. *See Id.* And the Court has firmly established this principle in other contexts, too. *See, e.g.*, *Blum*, 457 U.S. at 1011 (publicly funded nursing home); *Polk Cnty. v. Dodson*, 454 U.S. 312, 320–21 (1981) (public defender on state payroll).

Second, the Court stressed that even extensive and detailed regulation of the conduct in question is not sufficient to establish state action — instead, the state

must compel or coerce the conduct. *Rendell-Baker*, 457 U.S. at 841. Although the state heavily regulated the policies of the school, the regulators showed "relatively little interest in the school's personnel matters". *Id.* Thus, since the challenged firings were not "compelled or even influenced by any state regulation," the Court refused to turn the "private management" decisions of a private institution into state action. *Id.* at 841–42. And like the unimportance of public funding, the Court has consistently applied this principle as well. *See, e.g.*, *Jackson*, 419 U.S. at 358–59 (heavily regulated public utility); *Sullivan*, 526 U.S. at 57–58 (heavily regulated private insurers).

Finally, the Court emphasized that the conduct in question must be "traditionally the *exclusive* prerogative of the State" to qualify as state action. *Rendell-Baker*, 457 U.S. at 842 (internal quotation marks omitted) (emphasis in original). In making this determination, the Court has recently admonished against "widen[ing] the lens" on the function in question to "ignor[e] the threshold state-action question." *Halleck*, 139 S. Ct. at 1930. Instead, the Court asks whether the specific function actually provided by the private party was traditionally exclusive to the state. *See Id.* at 1929–30 (defining the function as operating public access channels rather than providing a public forum for speech generally). As such, in *Rendell-Baker*, the Court specified that the school's actual function was to provide "education [to] maladjusted high school students" rather than using

a more general description like providing education. *Rendell-Baker*, 457 U.S. at 842.

And "[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (internal quotation marks omitted). In fact, the Court has clearly identified only two — running elections and operating a company town. *See Halleck*, 139 S. Ct. at 1929 (identifying these functions). In contrast, the Court has repeatedly refused to find state action based on a state's past or present performance of some non-exclusive task. *See, e.g.*, *Id.* (collecting cases). Likewise, the Court has consistently refused to equate activities that serve the public in some way with traditionally exclusive state functions. *Id.*

So, in *Rendell-Baker*, the Court dismissed as irrelevant whether the school served the public and asked instead whether the "education of maladjusted high school students" was one of the few historic, exclusive powers of state. *Rendell-Baker*, 457 U.S. at 842. In answering this question, the Court distinguished between the "legislative policy choice" to provide alternative educational opportunities at public expense and historically exclusive state functions. *Id.* Noting that the state had "until recently . . . not undertaken to provide education for students who could not be served by traditional public schools," the Court held that the school could not be considered a state actor. *Id.* at 842–43.

These three principles — that public funding is largely irrelevant, that mere regulation without coercion or compulsion is insufficient, and that only historically exclusive functions are attributable to the state — are clear and well established. In fact, every circuit court to have analyzed whether privately operated schools are state actors have followed the reasoning of *Rendell-Baker*. Pet. App. 67. The First Circuit, for example, rejected a claim that a privately operated school was a state actor, reasoning that "education is not and never has been a function reserved to the state." *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26–27 (1st Cir. 2002). The Ninth Circuit reached a similar conclusion, ruling that a public charter school was not a state actor since *Rendell-Baker* "foreclosed" the argument that "public educational services" are traditionally exclusive to the state. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010) (internal quotation marks omitted). Likewise relying on *Rendell-Baker*, the Third Circuit determined a publicly funded school that educated juvenile sex offenders was not a state actor. *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 162, 166 (3d. Cir. 2001) (Alito, J.).

B. Considering this guidance, Charter Day is not a state actor.

With this precedent in mind, the Court should not attribute the school's decision to implement a dress code policy to the state.

At the outset, the Court can largely ignore North Carolina's legislative decision to fund the school's operation. Like the school in *Rendell-Baker*, Charter

Day does not transform into a state actor merely because it relies on government contracts to sustain its business. *See Rendell-Baker*, 457 U.S. at 840–41 (minimizing the importance of state funding).

Similarly, the Court should give North Carolina's regulation of Charter Day little weight. As *Rendell-Baker* demonstrates, North Carolina does not turn private conduct into state action through even "extensive and detailed" regulation — coercion must be shown. *See id.* at 841 (internal quotation marks omitted) (applying the rule). North Carolina takes a hands-off approach towards charter schools like Charter Day, allowing them to design their own curriculums, budgets, and operating procedures without oversight. *See Id.* §§ 115C-218.60, 115C-390.2(a) (requiring, but not supervising, policies); *See also Id.* § 115C-218.10 (exempting from school board rules). Indeed, the state gave Charter Day's private board of directors, which it had no role in selecting, complete authority over whether and how to implement the uniform dress code policy. *See Id.* § 115C-218.15(d) (empowering private boards of directors). So, like the regulators in *Rendell-Baker*, North Carolina has shown "little interest" in the school's dress code. *See Rendell-Baker*, 457 U.S. at 841 (considering state coercion). It strains reason to suggest that North Carolina compelled Charter Day to implement a policy that the state expressly left to the school's discretion.

Finally, the school does not perform a historically exclusive state function. In answering this question, the Court should focus on the specific function

actually provided by the school without "widening the lens" to a high level of generality. *See Halleck*, 139 S. Ct. at 1930 (applying this approach). After all, the Court defined the function at issue in *Rendell-Baker* as educating "maladjusted high school students." *Rendell-Baker*, 457 U.S. at 842. Thus, Charter Day's function must be defined with an eye towards the school's actual role within North Carolina's educational landscape.

Specifically, then, Charter Day provides an alternative education outside of traditional public schools. Through the Charter School Act, North Carolina contracted with the school to "operate independently of" traditional public schools and offer "different and innovative teaching methods." *See* N.C. Gen. Stat. § 115C-218(a)(1), (3) (outlining the Act's goals). Indeed, North Carolina hoped that Charter Day would "provide parents and students with expanded choices" outside traditional public schools. *See Id.* § 115C-218(a)(5) (outlining the Act's goals).

And by the terms of Charter Day's contract, North Carolina does not regulate Charter Day as it does traditional public schools. *Id.* §§ 115C-218.15(a)–(b), (d), 115C-218.10, 115C-218.15(c). Charter Day took advantage of this freedom to build an innovative educational program much unlike what is found within traditional public schools. *See* J.A. 111 (outlining the school's philosophy, methods, and goals). Indeed, traditional public schools do not share Charter Day's focus on classical western values, nor do they enforce policies like the uniform dress code. *Id.* But that's fine — in fact, it's exactly what the

legislature intended when they granted the school's charter. *See* N.C. Gen. Stat. § 115C-218(a)(3) (encouraging independent schools with innovative methods). After all, students are always free to attend a state-operated public school if they wish. *Id.* § 115C-218.45(a)–(b). Charter Day is just another option.

So, Charter Day does not perform a historically exclusive state function. Private actors have taught students outside of North Carolina's traditional public schools for centuries. Private schools, for example, have existed in North Carolina since its earliest days. *See, e.g.*, 1805 N.C. Sess. Law XL (funding a private school). Similarly, parents in North Carolina have long exercised the freedom to homeschool. *See generally Delconte v. State*, 329 S.E.2d 636 (N.C. 1985) (exploring homeschooling in the state). Indeed, the state constitution "specifically envisions that children in [North Carolina] may be educated by means outside of the [traditional] public school system." *Hart v. State*, 774 S.E.2d 281, 293 (N.C. 2015). And, over the years, North Carolina has consistently supported these alternative approaches by funding "educational initiatives outside of [traditional public schools]." *Id.* at 290; *See e.g.*, 1805 N.C. Sess. Law XL (funding a private school); *and see* N.C. Gen. Stat. § 115C-562.1 (allowing eligible students at private schools to receive state funded scholarships).

Families still appreciate this freedom of choice today. In 2020, over 100,000 children in North Carolina attended a private school. Chená T. Flood, N.C. DEP'T ADMIN., *2020 North Carolina Private School Statistics*, 2 (2020), *available at*

https://files.nc.gov/ncdoa/Annual-Conventional-Schools-Stats-Report-2019-2020_1.pdf. Similarly, in in 2022, over 100,000 students were homeschooled. N.C. DEP'T ADMIN., *2022 North Carolina HOME SCHOOL Statistical Summary*, 3 (2022), *available at* https://ncadmin.nc.gov/media/14076/download?attachment. Parents make these choices for a variety of reasons. A Catholic family may choose a religious private school, for example, to ensure their daughter is educated in the tenants of their faith. Or a military family may choose to homeschool their son rather than force him to change schools every time the family relocates. But regardless of why parents choose alternative education for their children, North Carolina has always provided them that choice. The choice to send a child to Charter Day is no different, and no more within the historically exclusive powers of state.

In sum, Charter Day cannot be considered a state actor under the precedents of this Court. Although Charter Day is financially supported by the state, so was the school in *Rendell-Baker*. *See Rendell-Baker*, 457 U.S. at 840–41 (examining state funding). And like *Rendell-Baker*, North Carolina has shown "little interest" in regulating, much less coercing, Charter Day's dress code policy. *See Id.* at 841 (examining regulation). Finally, like the school in *Rendell-Baker*, Charter Day did not assume a historic, exclusive province of state. *See Id.* at 841 (examining the function provided).

C. The 4th Circuit's arguments to the contrary are unconvincing.

The Court should not accept the 4th Circuit's arguments to the contrary. First, the 4th Circuit erred in holding that North Carolina delegated its constitutional obligation to provide free public education to Charter Day. Second, the 4th Circuit emphasized the school's public designation in state law, even though the Court has repeatedly rejected that approach.

In holding that North Carolina delegated its constitutional obligation to Charter Day, the 4th Circuit misapplied *West v. Atkins*. In *West*, the Court recognized a limited exception to the principle that private contractors are generally not state actors. *See West v. Atkins*, 487 U.S. 42, 49–51, 54–56 (1988). The Court held that a doctor who contracted with the state to treat prison inmates acted under color of state law while treating patients. *Id.* at 57–58. The state was required by the Eight Amendment to provide medical care to prisoners. *Id.* at 54. However, the state had fully abdicated this obligation to private contractors, leaving prisoners no choice but to accept the private contractor's care. *Id.* at 54–55. In finding state action, the Court stressed that states cannot delegate duties which they are "constitutionally obligated to provide and leave [their] citizens with no means for vindication of those [constitutional] rights." *Id.* at 56–57, n.14.

North Carolina has not delegated its constitutional obligations in the same way here. To be sure, the North Carolina Constitution requires the state to provide "a general and uniform system of free public schools." N.C. Const. art. IX, § 2, cl. 1. But North

Carolina courts recognize that this constitutional obligation "merely requires that all North Carolina students *have access* to a sound basic education." *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 741 (N.C. Ct. App. 2011) (emphasis added).

North Carolina has not abdicated that obligation by allowing students the option of attending Charter Day. After all, unlike the state in *West*, North Carolina continues to operate a system of state-operated public schools that can, and do, accept any and all students who wish to attend. *See West*, 487 U.S. at 55 (noting the state's wholesale reliance on private contractors). Charter schools, on the other hand, operate "independently of existing schools" to provide students with "expanded choices" for their education. N.C. Gen. Stat. § 115C-218(a), (5). So, rather than delegating constitutional obligations to Charter Day wholesale, North Carolina simply gave students another choice beyond the "traditional public schools that have been establish in order to comply with [the state constitution]." *See Sugar Creek*, 712 S.E.2d at 742 (distinguishing between traditional public schools, which fulfill the state's constitutional obligations, and public charter schools).

And this student choice matters. Unlike the prisoners in *West*, who had no choice but to accept treatment from private contractors, students in North Carolina are never required to attend Charter Day. *See West*, 487 U.S. at 55 ("It is only those physicians . . . to whom the inmate may turn."). In *West*, the Court stressed that the inmates had "no means for vindication of their [constitutional] rights" unless the

private contractors could be held liable under § 1983. *Id.* at 56–57, n.14. Here, on the other hand, students in North Carolina can vindicate their constitutional rights and attend free public school without transforming Charter Day from a private corporation to a state actor. In short, *West* does not suggest that Charter Day is a state actor because no student is required to attend Charter Day and every student may still attend a traditional public school.

Similarly, the 4th Circuit erred in relying upon the school's "public" designation in state law. In fact, this Court has repeatedly rejected similar arguments. In *Jackson*, for example, the Court held that a private utility company was not a state actor despite clear statutory language designating the company as "public." *Jackson*, 419 U.S. at 346, 358–59. And in *Dodson*, the Court emphasized that even though "public" defenders are nominally affiliated with the state, they are not necessarily state actors for the purposes of § 1983. *Dodson*, 454 U.S. at 324–25. Most recently, the Court held a private corporation statutorily required to provide "public access" channels was not a state actor. *Halleck*, 139 S. Ct. at 1926, 1934. With these precedents in mind, the Court should attach little importance to the school's public designation.

Moreover, the 4th Circuit was wrong to claim federalist principles require a focus on Charter Day's statutory designation. To be sure, North Carolina chose to label Charter Day 'public' under state law. N.C. Gen. Stat. § 115C-218.15(a). Still, this Court should recognize that North Carolina "did not intend

for charter schools to be deemed to be agencies or instrumentalities of the State." *State ex rel. Stein v. Kinston Charter Acad.*, 866 S.E.2d 647, 659 (N.C. 2021). North Carolina's linguistic choice must not be misconstrued — the state did not intend to declare Charter Day a state actor.

In short, the 4th Circuit misapplied *West v. Atkins* and improperly relied upon statutory designations. This Court should not sanction the 4th Circuit's misunderstanding.

D. There are countervailing reasons against finding state action.

Finally, the Court should remember that the state action analysis "lack[s] rigid simplicity." *Brentwood*, 531 U.S. at 295. Thus, even when a private entity's conduct might otherwise rise to state action, the Court may decline to expose the entity to constitutional liability when "countervailing reason[s] against attributing activity to the government" exist. *Id.* at 295–96.

The Court cemented this principle in *Dodson*. There, despite significant evidence to the contrary, the Court refused to call a public defender's representation of an indigent client state action. *Dodson*, 454 U.S. at 314–17. The public defender was a full-time employee of the state and was assigned to represent the client during the normal course of employment. *Id.* at 314. Considering these ties, the 8th Circuit determined that the public defender was "'merely a creature of the State'" and found state action. *Id.* at 316. But despite this evidence, the Court

reversed. *Id.* at 317. The Court reasoned that policy considerations, particularly the special role of public defenders within the justice system, counseled against state action. *Id.* at 317–19.

Similar policy considerations exist here. First, the Court should consider the potential effect on our federalist structure. The Court has long acknowledged that federalism "preserves the integrity, dignity, and residual sovereignty" of states. *Bond v. United States*, 564 U.S. 211, 221 (2011) (internal quotation marks omitted). And the Court has identified providing educational programs as central to state sovereignty. *See United States v. Lopez*, 514 U.S. 549, 564 (1995). Here, North Carolina exercised its sovereign power over education by passing the Charter School Act, allowing private corporations to establish independent schools. Yet by calling Charter Day a state actor, the 4th Circuit frustrated North Carolina's sovereign right to create and fund educational programs outside state control. Now, contrary to North Carolina's intent, schools like Charter Day will find their independence over day-to-day decisions stifled by federal demands.

And the 4th Circuit's decision threatens the benefits that North Carolina's citizens gain from our federalist structure. After all, the Court understands that federalism "secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (internal quotation marks omitted). Indeed, everyone benefits when states are empowered to serve "as laboratories for experimentation to devise various solutions where the best solution is far from

clear." *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (discussing experimentation in education). Today, students across our nation face an overwhelming array of problems — gun violence, bullying, sexual harassment — without clear solutions. With the Charter School Act, North Carolina addressed these problems by freeing schools like Charter Day to experiment without state interference. Charter Day took that freedom and ran with it, creating an innovative program that is both extremely popular and extremely successful at producing well-adjusted, high-performing students. Of course, North Carolina's experiment benefits those who attend Charter Day. But it also benefits the entire country by testing a novel solution to a national problem. The Court should not threaten the success of this experiment by exposing Charter Day to massive litigation costs.

Finally, the Court should recognize that calling Charter Day a state actor would hurt North Carolina's families most. The Court acknowledges the inherent right of parents "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925). Indeed, the Court has warned against using state power to "standardize" children by limiting parental choice over education. *See Id.* at 535. Simply put, parents know how to raise their own children better than the federal government. In North Carolina, countless families choose Charter Day because of its independence from state control and subsequent freedom to innovate. These families aren't stupid, nor

do they need special protection from the judiciary — Charter Day's approach has proven to be extremely successful, and no child is forced to attend. The Court should not stand in their way.

In sum, the 4th Circuit's reasoning would damage our federalist structure and weaken parental rights. With these considerations in mind, the Court should hold Charter Day did not implement the dress code under color of law.

II. Title IX cannot reach Charter Day's dress code without violating the Spending Clause.

Peltier also alleges that Charter Day violated Title IX by implementing the uniform dress code policy. Title IX prohibits sex discrimination in any "educational program or activity" receiving federal financial assistance. 20 U.S.C. § 1681(a). However, the Court has never clarified whether Title IX regulates gender-specific dress code policies like Charter Day's.

When passing Title IX, Congress invoked the power of the Spending Clause. *See Barnes v. Gorman*, 536 U.S. 181, 185–86 (2002) (interpreting Title IX consistently with Title VI). So, Title IX is like a contract — schools like Charter Day receive federal funds and, in return, agree to comply with Title IX's federally imposed conditions. *See Id.* at 186 (comparing Spending Clause legislation to contracts). But the Court has warned that the very "legitimacy of Congress' power to legislate" under the Spending Clause "rests on whether the recipient voluntarily and knowingly accept[ed] the [contract's] terms." *Id.*

(internal quotation marks and brackets omitted). So, when interpreting Spending Clause legislation like Title IX, the Court considers the "central concern" of "ensuring that the receiving entity of federal funds has notice" of federal conditions. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (internal quotation marks and brackets omitted).

Thus, Charter Day faces Title IX liability only if Congress "unambiguously" conditioned funding on a ban of gender-specific dress codes. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) (plurality) (quoting *Pennhurst*, 451 U.S. at 17) (noting federal conditions cannot be ambiguous). To determine whether Title IX unambiguously reaches gender-specific dress codes, the Court should consider a range of circumstances. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985) (applying to Title I). Specifically, the Court should examine "the legal requirements in place when the grants were made" including "the statutory provisions, regulations, and other guidelines provided by the [Department of Education] at the time." *See Id.* (applying to Title I).

Here, the Court should find Title IX does not reach Charter Day's policy. First, the regulatory scheme has indicated that Title IX does not cover appearance codes for decades. Second, the text of Title IX is ambiguous with respect to gender-specific dress codes.

A. The regulatory scheme indicates that Title IX does not reach dress codes.

At the outset, the Court can consider the "regulations" and "guidelines provided" by the Department of Education at the time Charter Day accepted federal funds. *See Id.* (applying to Title I).

To be sure, in 1975, the Department of Education issued a regulation prohibiting discrimination "against any person in the application of any rules of appearance." 40 Fed. Reg. 24,141 (June 4, 1975). But crucially, the Department decided to withdraw that regulation altogether just seven years later. 47 Fed. Reg. 32,526-27 (July 28, 1982). In fact, when withdrawing the regulation, the Department declared "[t]here is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* at 32,527. And the Department was explicit that the "[d]evelopment and enforcement of appearance codes is an issue for local determination." *Id.* at 32,526. The Department is seemingly satisfied with its handiwork— in the forty years since the revocation, the agency has not even attempted to pass another regulation covering dress codes. Pet. App. 99.

And the Department is not alone in believing that the adoption of dress codes "should be left to local discretion." 47 Fed. Reg. 32,527 (July 28, 1982). Indeed, at least twenty other agencies agree. *See* 65 Fed. Reg. 52,859 (Aug. 30, 2000) (adopting the Department's interpretation of Title IX). Furthermore, although the caselaw is inconclusive, courts have suggested that Title IX does not reach

dress codes. *See, e.g.*, *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577–78 (7th Cir. 2014) (collecting cases). So too have numerous legal scholars, each noting that the Department's actions have made it unlikely that Title IX reaches dress code claims. *See, e.g.*, Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Pol'y 281, 286 (2009); Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 Miss. L.J. 323, 334 (1989).

With this backdrop in mind, Charter Day could not have known that the uniform dress code policy would be threatened by federal conditions. Because Congress charged the Department of Education with implementing and enforcing Title IX, Charter Day examined the Department's guidance when considering whether to accept federal funds. Pet. App. 97. And during this inquiry, the Department of Education was explicit — Charter Day could implement the policy without violating Title IX. The Court should not pull the rug out from underneath schools like Charter Day, who reasonably relied on the clear declarations of a federal regulatory body, by retroactively broadening Title IX.

B. The plain text of Title IX is ambiguous.

The Court can also consider "the statutory provisions" of Title IX. *See Bennett*, 470 U.S. at 670 (applying to Title I). When doing so, the Court should interpret Title IX "in accord with the ordinary public

meaning of its terms at the time of its enactment." *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020) (applying to Title VII).

Considering Title IX's statutory language, Charter Day was not clearly notified that federal conditions would restrict the uniform dress code policy. For one thing, Charter Day did not clearly "exclude[]" anyone from nor "den[y]" anyone the benefits of any "educational program" or "activity." *See* 20 U.S.C. § 1681(a). After all, Charter Day offers the same educational programs to both sexes. To be sure, Peltier may argue that female students are excluded from wearing shorts and are therefore denied the benefits of free movement and comfort in the classroom. But wearing shorts is not clearly an "educational program" or "activity," and so Charter Day has not clearly excluded or denied anyone from anything that Title IX unambiguously protects. *See Id.* (not defining those terms).

Furthermore, Charter Day did not clearly "discriminate against" anyone. *See Id.* (defining Title IX's scope). The Court understands the ordinary public meaning of 'discriminate against' to mean "treating [an] individual worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. To be sure, Charter Day asks female students to wear skirts, skorts, or jumpers on most days. Pet. App. 111–12. But male students are similarly restricted, the policy is delicately enforced, and the school frequently waives the policy. *Id.* So, although the policy treats male and female students differently, reasonable minds can disagree as to whether either gender is

treated worse. Indeed, reasonable parents have sent their children to Charter Day without complaint for years. With all this in mind, Charter Day simply had no way to know the policy would be considered discriminatory under Title IX.

In short, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising" schools like Charter Day with retroactive conditions. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) (noting this principle). Charter Day reasonably relied upon the regulatory scheme and text of Title IX to determine the uniform dress code policy would not violate federal conditions. The Court should not punish Charter Day for doing so.

CONCLUSION

The judgement of the court of appeals should be reversed.

Respectfully submitted,

Jacob Sugarman
Counsel of Record
Duke University School of Law
210 Science Drive
Durham, NC 27708
(516) 458-0223
Jacob.sugarman@duke.edu

October 19, 2022

Applicant Details

First Name	**Nicholas**
Last Name	**Sweeney**
Citizenship Status	**U. S. Citizen**
Email Address	**sweeneyn@umich.edu**
Address	**Address** Street **15 Riverplace Drive, Unit 1533** City **South Portland** State/Territory **Maine** Zip **04106** Country **United States**
Contact Phone Number	**(614) 264-9409**

Applicant Education

BA/BS From	**Haverford College in Pennsylvania**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Edmonds, Mira
edmondm@umich.edu
Halberstam, Daniel
dhalber@umich.edu
734-763-4408
Vogel, Cecilia
Cecilia.Vogel@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

NICHOLAS ARMIG SWEENEY
1200 Broadway Street, Apt. 714, Ann Arbor, MI 48105
(614) 264-9409 (cell) | sweeneyn@umich.edu

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

June 12, 2023

Dear Judge Walker:

I am a third-year law student at the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. As an aspiring Assistant U.S. Attorney who had the opportunity to contribute to white collar, public corruption, and narcotics cases as an intern at the SDNY U.S. Attorney's Office, I admire your experience prosecuting white collar crime at the EDVA U.S. Attorney's Office. Further, I am particularly interested in clerking and practicing in EDVA in light of its accelerated docket. For these reasons, I would find the opportunity of clerking in your chambers especially meaningful and enriching.

Prior to law school, I spent two years working in Armenia and France and observed various issues related to rule of law and human rights. These experiences inspired me to pursue a career in government or public interest litigation, and my experience at the U.S. Attorney's Office has more specifically drawn me to federal prosecution. In law school, I have endeavored to improve my research and writing skills. I received Honors in my legal writing course, was selected to serve as an Executive Editor of the *Michigan Law Review*, and have completed a draft of a student Note centered on treaty-withdrawal and executive power. As an advocate, I took on a unique level of responsibility in my litigation clinic by leading a five-hour, trial-like administrative hearing. As part of this hearing, I wrote direct- and cross-examinations for ten witnesses, presented an opening statement and closing argument, and independently researched case law, statutory law, and legislative history. I handled this responsibility in addition to several eviction cases, for which I drafted pleadings, conducted settlement conferences, and appeared in court regularly. I believe these experiences will prepare me well to succeed as a clerk in your chambers.

I have enclosed my resume, law school transcript, and a writing sample for your review. Letters of recommendation from two of my professors and from my work supervisor at SDNY have also been provided. Their names and contact information are:

- Professor Mira Edmonds: edmondm@umich.edu, (734) 763-4408
- Professor Daniel Halberstam: dhalber@umich.edu, (734) 647-1964
- Cecilia Vogel, Assistant U.S Attorney, Southern District of New York, Cecilia.Vogel@usdoj.gov, (646) 640-6296

Thank you for your time and consideration.

Respectfully,
Nicholas A. Sweeney

NICHOLAS ARMIG SWEENEY
1200 Broadway Street, Apt. 714, Ann Arbor, MI 48105
(614) 264-9409 (cell) | sweeneyn@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL Ann Arbor, MI
Juris Doctor Expected May 2024
GPA 3.793
Journal: *Michigan Law Review* (Executive Editor, Editorial Board Member).
Activities: Independent Student Note Research with Professor Daniel Halberstam (writing on withdrawal from international agreements); Civil-Criminal Litigation Clinic (Student Attorney); M For The People – Public Service and Prosecutorial Society (Events Chair); Environmental Crimes Project (Pro Bono Volunteer).

HAVERFORD COLLEGE Haverford, PA
Bachelor of Science in Astrophysics, minor in Philosophy, *Phi Beta Kappa, Magna Cum Laude* May 2019
Honors: High Honors in Astrophysics; ITA Tennis Scholar-Athlete (2016-19); Ambler Student-Athlete Award.
Activities: *Haverford Law Review* (Ed Board Member; Author of *The International Criminal Court at a Crossroads: Tracing the Development of Universal Norms,* 2019); Mock Trial (Attorney); Varsity Tennis (Co-Captain).

EXPERIENCE

MANHATTAN DISTRICT ATTORNEY'S OFFICE New York, NY
Summer Law Fellow June 2023 – August 2023

MICHIGAN CIVIL-CRIMINAL LITIGATION CLINIC Ann Arbor, MI
Student Attorney August 2022 – May 2023

- Spoke on the record as lead counsel for plaintiff or defendant in landlord-tenant and administrative matters.
- Prepared and delivered direct examinations and opening and closing statements for an administrative hearing.
- Researched and wrote motions, counseled clients, drafted pleadings, and negotiated settlements.

U.S. ATTORNEY'S OFFICE, SOUTHERN DISTRICT OF NEW YORK New York, NY
Summer Law Intern – Criminal Division (Money Laundering Unit; Public Corruption Unit) May 2022 – August 2022

- Drafted motions and briefs on issues such as Compassionate Release during the Covid-19 pandemic and the interpretation of U.S. Sentencing Guidelines provisions.
- Researched and wrote memos on evidentiary matters such as the applicability of hearsay exceptions.
- Performed background investigative work and attended proffers, witness preparations, and court proceedings.

LYCÉE DÉODAT DE SÉVERAC Toulouse, France
English Language Teacher September 2020 – April 2021

- Taught high-school students and coached graduating students for cumulative "Baccalauréat" exams.
- Graded and provided feedback for student presentations on cultural themes such as politics, AI, and social justice.

SHIRAK STATE UNIVERSITY Gyumri, Armenia
Guest Lecturer and English Teacher October 2019 – January 2020

- Lectured to prospective foreign language teachers on English teaching methodology from the U.S.
- Directed English Club for students to improve conversational fluency and understanding of American culture.

HAVERFORD | SWARTHMORE | OHIO WESLEYAN Haverford, PA | Swarthmore, PA | Delaware, OH
Three Years as Summer Research Fellow Summers 2016, 2017, 2018

- Conducted long-term Astrophysics research leading to thesis and presentations at national conferences.

ADDITIONAL

Languages: French (Fluent – DALF C1), Spanish (Intermediate), Armenian (Intermediate).
Volunteer: "AYO" Women's Rights Fundraising Project (2020, 20hrs/wk); Armenia Tree Project (2020, 20hrs/wk); Gyumri High School Volunteer English Teacher (2020, 20hrs/wk); Haverford Astronomy Night (2017-19, 2hrs/wk).
Interests: Tennis; violin; film; learning new languages.

Control No: E196660101 Issue Date: 05/30/2023 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sweeney,Nicholas Armig
Student#: 48134572

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	004	Civil Procedure	Maureen Carroll	4.00	4.00	4.00	A-
LAW	520	003	Contracts	Albert Choi	4.00	4.00	4.00	A-
LAW	540	001	Introduction to Constitutional Law	Daniel Halberstam	4.00	4.00	4.00	A
LAW	593	013	Legal Practice Skills I	Timothy Pinto	2.00		2.00	H
LAW	598	013	Legal Pract:Writing & Analysis	Timothy Pinto	1.00		1.00	H
Term Total				**GPA: 3.800**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.800**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	530	002	Criminal Law	Luis CdeBaca	4.00	4.00	4.00	B
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	A
LAW	594	013	Legal Practice Skills II	Margaret Hannon	2.00		2.00	H
LAW	630	001	International Law	Gregory Fox	3.00	3.00	3.00	A
Term Total				**GPA: 3.636**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.721**		**23.00**	**28.00**	

Continued next page >

Control No: E196660101 Issue Date: 05/30/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sweeney,Nicholas Armig
Student#: 48134572

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	664	002	European Union Law	Daniel Halberstam	3.00	3.00	3.00	A
LAW	669	002	Evidence	David Moran	3.00		3.00	P
LAW	900	393	Research	Patrick Barry	1.00		1.00	S
LAW	920	001	Civil-Criminal Litigation Clnc	Mira Edmonds Victoria Clark	4.00	4.00	4.00	A+
LAW	921	001	Civil-Criminal Litig Clnc Sem	Mira Edmonds Victoria Clark	3.00	3.00	3.00	A-
Term Total				**GPA: 4.030**	**14.00**	**10.00**	**14.00**	
Cumulative Total				**GPA: 3.815**		**33.00**	**42.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	A-
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	B+
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A-
LAW	900	075	Research	Daniel Halberstam	2.00	2.00	2.00	A
LAW	980	424	Advanced Clinical Law	Mira Edmonds	2.00	2.00	2.00	A+
Term Total				**GPA: 3.742**	**14.00**	**14.00**	**14.00**	
Cumulative Total				**GPA: 3.793**		**47.00**	**56.00**	
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	05/30/2023							
LAW	612	001	Alternative Dispute Resolution	Allyn Kantor	3.00			
LAW	641	001	Crim Just: Invest&Police Prac	Ekow Yankah	4.00			
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	780	001	Human Rights: Themes and Var	Steven Ratner	3.00			

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Sweeney,Nicholas Armig
Student#: 48134572

University Registrar

End of Transcript
Total Number of Pages 3

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University of Michigan Law School
Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

Rashida Y. Douglas
Registrar; Director
Office of Student Records, 300 Hutchins Hall
625 S. State Street, Ann Arbor, MI 48109-1215
Phone: 734.763.6499 | Fax: 734.936.1973
Email: lawrecords@umich.edu

Memo: 2018 - 2022 Class Ranking

To whom it may concern:

The University of Michigan Law School does not rank its current students; however, it does rank graduates upon completion of their degrees. As the GPAs that correspond to particular percentages do change slightly from year to year, we are providing averages for the graduating classes from the past five academic years (2018 - 2022). Thus, the following information may assist you in evaluating candidates:

-- Students with a cumulative GPA of 4.010 and above finished in the top 1%
-- Students with a cumulative GPA of 3.941 and above finished in the top 2%
-- Students with a cumulative GPA of 3.921 and above finished in the top 3%
-- Students with a cumulative GPA of 3.884 and above finished in the top 5%
-- Students with a cumulative GPA of 3.820 and above finished in the top 10%
-- Students with a cumulative GPA of 3.772 and above finished in the top 15%
-- Students with a cumulative GPA of 3.735 and above finished in the top 20%
-- Students with a cumulative GPA of 3.700 and above finished in the top 25%
-- Students with a cumulative GPA of 3.650 and above finished in the top 33%
-- Students with a cumulative GPA of 3.563 and above finished in the top 50%

During the Winter 2020 term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, the students who graduated in the May 2020 term graduated with five semesters of graded courses, rather than six.

Rashida Y. Douglas
Law School Registrar & Director for the Office of Student Records

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with great enthusiasm that I write this recommendation for Nicholas ("Nick") Sweeney. Nick was my student during the Fall 2022 semester in the Civil-Criminal Litigation Clinic ("CCLC") at Michigan Law. The CCLC is a general litigation clinic in which law students work in teams of two on a variety of civil and criminal legal matters. I supervised Nick's case work and taught him in the seminar component of the clinic. He performed outstandingly well in all aspects of the course. Nick is a smart, detail-oriented, and thoughtful young man who I have no doubt would be an excellent judicial clerk.

I supervised Nick and his partner on a challenging eviction matter, an affirmative housing case, and a Child Protective Services central registry appeal. Nick earned an incredibly rare A+ on his casework, in recognition of his consistent dedication, hard work, and excellent work product. He and his partner truly took ownership of their cases, going above and beyond for all of their clients.

In the eviction matter, Nick and his partner worked hard to earn their client's trust, which was not immediately forthcoming due to her past trauma and mental health struggles. They worked effectively with their client's mental health caseworker to harmonize efforts on behalf of their client. Nick and his partner wrote a strong reasonable accommodation letter, and Nick also wrote two excellent legal memos that informed our strategy in the case. The legal memos reflected careful legal research and analysis, as well as elegant writing.

Nick and his partner also spent months preparing for a relatively complex administrative hearing in the CPS case. Nick chose to stay on with the clinic past the end of the semester to represent his client at the hearing. That decision reflected his dedication both to his client and to taking every opportunity to improve his skills as a lawyer. The hearing ended up taking five hours during which Nick and a new student partner conducted several lengthy direct and cross examinations, as well as delivering effective opening and closing statements. I was thoroughly impressed with Nick's performance during the hearing, as well as the more than 100 hours that he spent in preparation. Nick shows great promise as a trial attorney, should that be the path that he chooses to pursue. As part of the seminar component of the clinic, our students conduct an entire mock jury trial from motions in limine through verdict. Nick performed very strongly in this setting as well. Once again, his thorough preparation was apparent, as was his capacity for self-reflection during subsequent discussions.

Nick is open-minded and incorporates feedback effectively. He is a real team player and an all-around pleasure to work with. In sum, I have no hesitations in recommending Nick for a position as your clerk, and I urge you to give serious consideration to his application.

Sincerely,

Mira Edmonds
Clinical Assistant Professor of Law

Mira Edmonds - edmondm@umich.edu

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215

Daniel H. Halberstam
Eric Stein Collegiate Professor of Law
Director, European Legal Studies

May 28, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in strong support of Nicholas Sweeney, who has applied for a clerkship in your chambers. Nick is an exceptionally talented and versatile young lawyer, who writes well and consistently analyzes difficult legal arguments with great care. I have no doubt he will make an excellent clerk in any chambers he is invited to join.

I first came to know Nick a couple of years ago when he took my constitutional law course as a first-year student. He was among the top five students of a very strong section. Nick was consistently prepared and came to class having digested the cases, ready to engage with productive questions and comments. I could always rely on him for our discussions and mock arguments, in which he performed admirably. Nick generally stood out for his mature analysis, especially when it came to politically difficult cases. His exam did not disappoint. It was well written and astutely analyzed all problems effectively – from Commerce Clause and "dormant" Commerce Clause questions to Section 5 of the 14th Amendment and stare decisis. He easily earned an "A" in that class.

As you might imagine, I was truly pleased to see Nick enroll in my course on European Union Law this past fall – essentially an introductory course on EU constitutional structure and rights. As it turns out, Nick speaks several languages, including French, Spanish, and Armenian, and has spent considerable time abroad, teaching in France and volunteering in Armenia. Nick was a quick study in EU law and in making effective constitutional arguments with regard to this foreign legal system. He chose to write an independent research paper for the course, which focused on minority representation rights in relation to secession. Within the confines of this term paper, his investigation deftly combined international law, EU law, and the distinctly European approach to fundamental rights analysis for a novel approach to secession claims. Again, Nick readily earned an "A".

Given Nick's academic performance and utmost professionalism in his general conduct, I have agreed this term to supervise an independent study in which he seeks to write a law review Note. Nick has provisionally chosen to consider the constitutional limits of the President's power to withdraw from certain international agreements in the absence of Congressional approval. So far, we have met to discuss Nick's proposed outline and thesis with the aim of refining the project to crystallize his original contribution. Nick has already impressed me by the amount of reading he has done on the project in developing a possible thesis. And he has been exceptionally responsive to my suggestions and conscientious in following through with yet further research and obtaining additional feedback from experts in the field.

Next to his interest in international law and human rights, Nick is also passionate about litigation, and in the near-term aspires to a position with the government (likely the Department of Justice) in litigation – be it civil or criminal. He's been especially taken by the fascinating and varied work of a U.S. Attorney's Office from his time last summer as an intern in the Office of the U.S. Attorney for the Southern District of New York. With any luck, he may be joining that office down the road as a junior attorney.

In summary, Nick is a most promising, earnest, and thorough young lawyer with a bright future. He is also highly congenial and professional with a broad set of interests. I recommend him to you most highly and without qualification. Please do not hesitate to contact me with any further questions you may have.

Yours sincerely,

Daniel H. Halberstam

Daniel Halberstam - dhalber@umich.edu - 734-763-4408

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 22, 2023

To whom it may concern,

I am writing to recommend Nicholas Sweeney as a judicial law clerk. I have been an Assistant United States Attorney in the Southern District of New York for five years and am currently in the Money Laundering and Transnational Criminal Enterprises Unit. I served as one of Nick's two supervising attorneys during his internship at the U.S. Attorney's Office for the Southern District of New York from June to August 2022.

Nick and I worked closely throughout his internship, speaking almost daily. Nick is friendly and collegial, and I enjoyed working with him. He has a good-humored and enthusiastic attitude toward his work, and he demonstrated intellectual curiosity and a keen desire to learn. Nick was never shy about coming to my office to ask insightful questions about criminal procedure, research techniques, and office policies.

As an intern in our office, Nick demonstrated diligence, critical-thinking, and commitment. Over the summer, I assigned Nick a variety of legal research tasks to assist me in preparing for an upcoming money laundering trial and to address legal issues that arose in various financial investigations, including: the admissibility of voice identification evidence; the admissibility of various hearsay statements pursuant to the co-conspirator, statement against penal interest, and effect on the listener exceptions; the contours of a "good faith basis" to support cross examination; and an analysis of the venue requirements for bank fraud and false statements to a financial institution. Nick's research was thorough, and he provided thoughtful and concise analysis of the relevant cases. With respect to the venue analysis, Nick not only analyzed the relevant caselaw but also adeptly applied his analysis to the particular facts of our investigation to assist me in brainstorming potential venue theories for the case. Nick was able to handle open-ended and specific research questions, and he periodically checked in with me on his own initiative and asked follow-up questions as necessary to ensure that his research and analysis were focused on the relevant issues. Nick also drafted an opposition to a motion for a compassionate release and a sentencing letter for two different narcotics cases that were well-researched and written clearly, requiring minimal revisions. Nick responsibly set his own deadlines and returned assignments in a timely manner.

Nick demonstrated a strong work ethic and genuine enthusiasm. Nick took every opportunity offered to attend court proceedings, proffer sessions, or other meetings, and he attended numerous preparation sessions with witnesses for my upcoming trial, including volunteering to attend sessions on Friday evenings with a challenging witness that required an interpreter. Nick demonstrated initiative by conducting factual research to track down suppliers and distributors of prescription drugs relevant to the case, which helped us identify potential witnesses for trial and

resolve important factual issues in the weeks before trial. Ultimately, Nick was so enthusiastic about participating in trial preparation that he extended his internship by two weeks.

I was particularly struck by Nick's commitment to work in public service. Over multiple conversations during the summer, Nick expressed that he was keen to work in the public interest as an attorney, and we discussed what steps he could take during law school to prepare himself for that work and different opportunities he could consider after law school to pursue a public interest career. Based on my recent conversations with Nick, I have learned that he continues to take steps to prepare himself for a public interest career, including participating in a clinic in which he examined multiple witnesses in an administrative hearing and securing an internship with a human rights organization in Geneva.

It was a true pleasure working with Nick, and I strongly recommend him to you as a clerk. I hope you will consider him for a clerkship position, and I would be happy to answer any further questions.

Sincerely,

by: Cecilia Vogel

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WRITING SAMPLE COVERSHEET

This writing sample below is a memorandum I wrote to my supervising AUSA while a legal intern at the U.S. Attorney's Office, Southern District of New York. My supervising AUSA advised me that the memo should be written as a draft of the letter brief he was required to submit to the Court. I received permission from the U.S. Attorney's Office to use this memorandum as a writing sample.

I adhere to SDNY conventions for citations where applicable and defer to Bluebook citation style in all other cases. In conformity with office policy at the U.S. Attorney's Office, I have removed the defendant's name. I have not received outside editing on this work.

TO: Daniel Wolf, Assistant U.S. Attorney, Southern District of New York

FROM: Nicholas Sweeney

DATE: June 21, 2022

RE: Whether the base offense level for the Defendant's 18 U.S.C. § 1594(c) conviction was correctly calculated by the presentence investigation report.

I. INTRODUCTION

The question posed is whether, under the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines"), a defendant convicted of a sex trafficking conspiracy pursuant to 18 U.S.C. § 1594(c) should be assigned the enhanced base offense level of 34, as he would be if convicted of the substantive offense defined in 18 U.S.C. § 1591(b). In this case, the enhanced base offense level of 34 should be assigned.

On February 26, 2019, the Defendant was charged in a one-count indictment under § 1594(c) for conspiring to commit sex trafficking by force, fraud, or coercion in violation of §§ 1591(a)(1), (a)(2), and (b). *See* Indictment (19 Cr. 131) ¶ 1. On June 11, 2021, the Defendant was convicted by a jury as charged. The Final Presentence Report (PSR) determined the Defendant's base offense level to be 34 according to U.S.S.G. § 2G1.1(a)(1). The Defendant objected, citing the Ninth Circuit Case, *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016).

The reasoning from *Wei Lin* should not be endorsed here. First, as other circuits have observed, the plain meaning of relevant Sentencing Guidelines provisions requires that sex trafficking conspiracies be treated in the same manner as their substantive offenses. Second, other circuits have noted that lowering the base offense level of a sex trafficking conspiracy compared to the that of a substantive offense would lead to absurd and structurally inconsistent results. Finally, all cases addressing this issue in this District have rejected *Wei Lin* and imposed the enhanced base offense level.

II. LEGAL BACKGROUND

Ordinarily, the base offense level for a federal crime is determined by identifying the appropriate Guidelines provision in Chapter 2 of the United States Sentencing Guidelines. *See* U.S.S.G. § 1B1.2(a). However, when the crime is a conspiracy, a judge must begin by looking to § 1B1.2: "If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense." *United States v. Sims*, 957 F.3d 362, 363 (3d Cir. 2019), *cert. denied*, 141 S.Ct. 404; U.S.S.G. § 1B1.2(a). Conspiracy under 18 U.S.C. 1594(c) is not listed in the Statutory Index, so courts have turned directly to § 2X1.1 to assess the base offense level.

Section 2X1.1(a) sets the base level for Conspiracy as "[the level] from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." Here, the Defendant was convicted of conspiring to violate 18 U.S.C. §§ 1591(a)(1), (a)(2), and (b)(1), which describe the offense of "[s]ex trafficking of children or by force, fraud, or coercion." *See* PSR (19 Cr. 131) ¶ 26. As described in the indictment, the Defendant's use of force and coercion was directed uniquely toward Victim-2. *See* Indictment ¶ 3(c). If the victim were a minor, then the base offense level corresponding to the substantive offense would be given by U.S.S.G. § 2G1.3. Since the victim of the Defendant's crime was not a minor, however, the provision associated with the Defendant's substantive offense is U.S.S.G. § 2G1.1, which sets a base offense level of 34 if the "offense of conviction" is designated by § 1591(b)(1), or 14 otherwise. U.S.S.G. 2G1.1(a)(1–2).

Courts have disagreed about which base offense level applies to conspiracies evaluated through § 2G1.1 when there is a cross-reference with § 2X1.1(a). *Wei Lin*, 841 F.3d 823 (9th Cir. 2016); *Sims*, 957 F.3d at 362; *United States v. Carter*, 960 F.3d 1007 (8th Cir. 2020), *cert.*

denied, 141 S. Ct. 835 (2020); *United States v. Valdez*, No. 19-12522, 2021 WL 3478402 at *1 (11th Cir. Aug. 9, 2021). In *Wei Lin*, the defendant pled guilty to a conspiracy count, 18 U.S.C. § 1594(c). *Wei Lin*, 841 F.3d at 825. The court held that this result did not warrant the heightened base offense level of 34 in § 2G1.1. *Id.* at 823. First, the court reasoned that it would be improper to apply § 2G1.1(a)(1) given that the text of § 2G1.1(a)(1) expressly requires an "offense of conviction" pursuant to § 1591(b)(1), and the conviction in this case was under § 1594(c). *Id.* at 826. The court also considered to legislative history. Judge Farris identified that the higher base offense level in § 2G1.1(a)(1) was added in response to Congress's adoption of the fifteen-year mandatory minimum in 18 U.S.C. § 1591(b)(1), ostensibly linking the heightened offense level with the substantive sex trafficking offense. *Id.* at 827. He also argued that since the Sentencing Commission "knew how to require [a conduct-based] comparison explicitly, and did not do so," a literal reading of the § 1591(b)(1) conviction requirement is appropriate. *Id*.

However, circuit courts that have considered this issue since *Wei Lin* have concluded oppositely. *Sims*, 957 F.3d at 362; *Carter*, 960 F.3d at 1007; *Valdez*, 2021 WL 3478402 at *1. In *Sims*, the defendant also pled guilty to 18 U.S.C. § 1594(c), but the Third Circuit held that the heightened base offense level in § 2G1.1(a)(1) applied. *Sims*, 957 F.3d at 362. The Court argued that § 2G1.1 "cannot be interpreted in isolation" of § 2X1.1., *Id.* at 364, and determined that when the two provisions are read together, the base level for a sex trafficking conspiracy is simply that of the substantive offense. *Id.* at 364-65. Judge Hardiman also recognized the "absurd results" that would follow from setting a substantially lower base offense level for conspiracies under 2X1.1 than for their substantive offenses. *Id.* at 364. Likewise, in *Carter*, the Eighth Circuit imposed the heightened base offense level for three defendants who pleaded guilty to violations of 18 U.S.C. § 1594(c). *Carter*, 960 F.3d at 1007. While reiterating a desire

to avoid "absurd results," *Id.* at 1014, and emphasizing that § 2G1.1 must be read "in light of" § 2X.1.1, *Id.*, the court added that commentary in Chapter 1 of the Guidelines supported an understanding that a conspiracy is to be accorded the same base offense level as its corresponding substantive offense. *Id.*; U.S.S.G. § 1B1.3, cmt. n.7. Finally, in *Valdez*, the defendant pled guilty to conspiring to sexually traffic a minor under § 1594(c). *Valdez*, 2021 WL 3478402 at *1. Because the victim was between the ages of 14 and 18 and the offense did not involve force, fraud, or coercion, the underlying substantive offense was § 1591(b)(2). *Id. at* *4. Similarly to *Sims* and *Carter*, The Eleventh Circuit held that the base offense level for § 1591(b)(2)—a level of 30—was proper given the plain meaning and commentary of the applicable guidelines. *Id.* at *5.

III. DISCUSSION

The heightened base offense level advocated for by the Third, Eighth, and Eleventh Circuits should be applied here for three independent reasons. First, such a reading better conforms with the text of § 2X1.1 and § 2G1.1. Second, it guards against the absurd results that would follow from violating the structural integrity of the United States Sentencing Guidelines and the Criminal Code. Third, this interpretation is consistent with existing case law in this District.

A. A Textual Analysis of § 2X1.1 and § 2G1.1 Favors an Enhanced Base Offense Level

A textual examination of U.S.S.G. §§ 2X1.1 and 2G1.1 demonstrates that 18 U.S.C. § 1594(c) convictions must receive the heightened base offense of 34. In the case of Conspiracy, § 2X1.1(a) states that the base offense level is "the base offense level from the guideline for the substantive offense, plus any adjustments from such guideline or any intended offense conduct

that can be established with reasonable certainty." U.S.S.G. § 2X1.1(a). Generally, this means that the base offense level for a conspiracy "will be the same as that for the substantive offense." *Id.* cmt. n.2. For offenses involving the "Promot[ion] [of] a commercial sex act or prohibited sexual contact with an individual other than a minor," § 2G1.1 provides that the base offense level is 34 if the "offense of conviction" is 18 U.S.C. 1591(b)(1), or 14 otherwise. U.S.S.G. § 2G1.1(a)(1). By (1) reading § 2G1.1 together with § 2X1.1, (2) examining the Guidelines' definition for "offense of conviction," and (3) placing interpretive value in the commentary of the Guidelines, it is clear that a base offense level of 34 must be applied. The purported intent of the Sentencing Commission should not outweigh what the plain meaning of the Guidelines indicates.

1. <u>Sections 2X1.1 and 2G1.1 Must Be Read Together</u>

Reading § 2G1.1 in the context of § 2X1.1 clarifies that the base offense level enhancement for § 1591(b)(1) also applies for § 1594(c). As a starting point, courts recognize that "as with statutory language, the plain and unambiguous language of the Sentencing Guidelines affords the best recourse for their proper interpretation." *United States v. Millar*, 79 F.3d 338, 346 (2d Cir. 1996). In doing so, all terms in the Guidelines should be given their "ordinary meanings." *United States v. Mullings*, 330 F.3d 123, 124-35 (2d Cir. 2003). Yet, to fully capture the plain meaning of a statute, courts must "[Look] to the statutory scheme as a whole and [place] the particular provision within the context of the statute." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The Second Circuit has used this rule to interpret the plain meaning of individual Guidelines provisions based on how those provisions function within the context and structure of the Guidelines as a whole. *See United States v. Manas*, 272 F.3d 159, 167 (2d Cir.

2001), *cert. denied*, 537 U.S. 1176 (2003); *United States v. Kennedy*, 233 F.3d 157, 163 (2d Cir. 2000).

Here, in order to ensure that the structure and scheme of the Guidelines are upheld, § 2G1.1 and § 2X1.1 must be read together. *Carter*, 960 F.3d at 1014; *Sims*, 967 F.3d at 364; *Valdez*, 2021 WL 3478402 at *5. *Wei Lin* did not acknowledge this and instead relied on what appeared to be a "straightforward interpretation of U.S.S.G. § 2G1.1(a)(1)" considered on its own. *Wei Lin*, 841 F.3d at 826. However, § 2G1.1(a)(1) must not be considered in isolation because Chapter 1, which provides "General Application Principles," expressly directs the judge to apply § 2X1.1 before any other offense-related provisions. U.S.S.G. § 1B1.2; *see also Sims* 967 F.3d at 363; *Valdez*, 2021 WL 3478402 at *4.

Examining § 2G1.1 and § 2X1.1 together, the plain and unambiguous language of § 2X1.1 expresses that the base offense level is that of the "substantive offense," where the substantiative offense is "the offense that the defendant was convicted of soliciting, attempting or conspiring to commit." U.S.S.G. § 2X1.1(a) & cmt. n.2. In this case, the Defendant was convicted of conspiring to commit sex trafficking in violation 18 U.S.C. §§ 1591(a)(1), (a)(2), and (b). *See* PSR ¶ 26. Thus, § 18 U.S.C. 1591(b)(1) qualifies as a substantive offense. Since § 2G1.1(a)(1) designates that § 18 U.S.C. 1591(b)(1) convictions have a base offense level of 34, the Defendant's § 18 U.S.C. § 1594(c) conviction should also receive a base offense level of 34.

Accepting that § 2X1.1 and § 2G1.1 must be read together, the term "base offense level" provides another reason for directly applying the base offense level of the substantive offense. Section 2X1.1 does not "instruct courts to apply the 'Guidelines Section'" relating to the substantive offense. *Sims*, 957 F.3d at 364. Rather, it "requires courts to apply the 'base offense level' for the substantive offense." *Id*. (quoting U.S.S.G. § 2X1.1(a)). As a result, the base

offense level of 34 should be directly applied for § 1594(c) convictions without walking through a fully independent application of § 2G1.1.

2. Definition of "Offense of Conviction"

The definition of "offense of conviction" in the Sentencing Guidelines also extends the enhancement in § 2G1.1(a)(1) to the Defendant's conviction under 18 U.S.C. § 1594(c). The Second Circuit recognizes that when a term from a statute or the Guidelines is "otherwise defined," the definition given may outweigh the term's ordinary meaning. *United States v. Martinez-Santos*, 184 F.3d 196 (2d Cir. 1999).

Here, § 1B1.2(a) indicates that the "offense of conviction" is "the offense conduct charged in the count of the indictment or information of which the defendant was convicted." U.S.S.G. § 1B1.2(a). In light of this definition, § 2G1.1(a)(1) should be read to require a base offense level of 34, so long as the defendant's conduct matches the conduct proscribed by § 1591(b)(1). *Sims*, 957 F.3d at 365; *United States v. Li*, No. 1:12-CR-00012-2, 2013 WL 638601 at *2 (D.N. Mar. I. Feb. 21, 2013). In *Sims*, the Eighth Circuit held that the enhanced base offense level in § 2G1.1(a)(1) was appropriate for a § 1594(c) conviction because the defendant's conduct was "identical to that proscribed in § 1591(b)(1)." 957 F.3d at 365. Similarly, in *Li*, the district court held that because "a conspiracy to violate Section 1591 involves the same conduct as a substantive violation," the base offense level of the substantive offense should apply. *Li*, 2013 WL 638601 at *3.

Here, the Defendant's conduct was also identical to what is proscribed in § 1591(b)(1). The relevant conduct covered by § 1591(b)(1) involves the "[s]ex trafficking of children or by force, fraud, or coercion." The Defendant's indictment for his count of conviction indicates that his conduct matches the description of sex trafficking by force and coercion articulated in §

1591(b)(1). The Defendant forced and coerced "Victim-2" to "engage in commercial sex acts" through physical violence, threats of deadly force, and the conditional withholding of heroin, a drug that the Defendant knew Victim-2 was addicted to. *See* Indictment ¶ 3(c). Thus, the Defendant should be allotted the enhanced base offense level, corresponding with § 2G1.1(a)(1).

Still, the court in *Wei Lin* stated that the description of the "offense of conviction" in terms of "offense conduct" in § 1B1.2(a) is not a "general definition." 841 F.3d at 826. The court in accepted that this conduct-based definition applied to the determination of the proper "offense guidelines section." *Id.* However, the court refused to extend the conduct-based definition to provisions where the term "offense of conviction" pertained to a specific statute and instead advocated for a direct "matching exercise" with the statute listed in the judgment for the defendant. *Id.*

With that said, the argument in *Wei Lin* for limiting the "offense of conviction" definition is not persuasive because there is a "presumption of consistent usage when interpreting the Sentencing Guidelines." *Sims*, 957 F.3d at 365 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018)). Moreover, the phrase "offense of conviction" has been broadly interpreted to extend to "all conduct in furtherance of the offense of conviction." *Id.* (citing *United States v. Murillo*, 933 F.2d 195, 199 (3d Cir. 1991)).

3. <u>Guidelines Commentary</u>

Third, the commentary following § 1B1.3 confirms that conspiracies are to be assigned the same base offense level as their substantive offenses. The Supreme Court has held that "commentary that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or entails a plainly erroneous reading of, the guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). Here, § 1B1.3, comment 7

states: "[A]n express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of a conspiracy . . . ." Thus, even ignoring the interplay between § 2X1.1 and § 2G1.1 and the conduct-based definition of "offense of conviction," courts have recognized that there is still conclusive support for applying a base offense level of 34 to conspiracies under § 1594(c). *Carter*, 960 F.3d at 1014; *Valdez*, 2021 WL 3478402 at *5.

4. Unambiguous Plain Language Negates *Wei Lin*'s Reliance on the Sentencing Commission's Intent

Wei Lin's reliance on the Sentencing Commission's intent in adding § 2G1.1(a)(1) to the Guidelines should not sway the Court's reasoning in this case. In *Wei* Lin, the court noted that the defendant's guilty plea to 18 U.S.C. § 1594(c) did not carry a mandatory minimum. *Wei Lin*, 841 F.3d at 825. It then reasoned because § 2G1.1(a)(1) was "created in direct response" to Congress's inclusion of a 15-year mandatory minimum in 18 U.S.C. § 1591(b)(1), the Sentencing Commission did not intend for the enhancement in § 2G1.1(a)(1) to be activated without the presence of the mandatory minimum. *Id.* at 827. Separately, the Ninth Circuit inferred that the Commission's failure to make explicit a conduct-based assessment for the base offense level, when it knew how to do so, weighed in favor of a strict interpretation of § 2G1.1(a)(1). *Id.*

In spite of these arguments, the courts need not consider other if interpretive sources if "language [of a statute] is plain and its meaning is sufficiently clear." *Novak v. Kasaks*, 261 F.3d 300, 310 (2d Cir. 2000), *cert. denied*, 531 U.S. 1012 (2000); *see also Carter*, 960 F.3d at 1014. In *Carter*, the Eighth Circuit held that considerations regarding the Sentencing Commission's intentions were impertinent to whether § 1594(c) received an enhanced base offense level since

there was "no ambiguity" in how the text of § 2X1.1 required § 2G1.1(a)(1) to be applied. 960 F.3d at 1014. Likewise, for the reasons described thus far in this case, the text of the Guidelines unambiguously requires the court to assess the Defendant's § 1594(c) conviction as having the same base offense level as § 1591(b)(1). Thus, concerns about the Commission's intent have little import.

In summary, the interplay between § 2G1.1 and § 2X1.1, the definition of "offense of conviction," and the commentary in §1B1.3 establish that the enhanced base offense level of 34 must applies to the Defendant's conviction under § 1594(c). Speculations about the Sentencing Commission's intent should not override these features in the plain text of the Guidelines.

B. An Enhanced Base Offense Level Preserves the Structural Integrity of the Sentencing Guidelines and the Criminal Code

A base offense level assignment of 34 for the Defendant's § 1594(c) conviction is appropriate because it avoids structural inconsistencies that would follow from treating sex trafficking conspiracies differently than their substantive offenses. If an interpretation of the Guidelines entails absurd results, these results should weigh against such an interpretation. *United States v. Pope*, 554 F.3d 240, 246 (2d Cir. 2009). Applying the § 2G1.1(a)(2) base offense level of 14 to § 1594(c) convictions would lead to absurd results for two reasons. First, it would generate significantly lower Guidelines recommendations for sex trafficking conspiracies than for less pernicious crimes. Second, it would improperly group § 1594(c) with nonviolent offenses that, contrary to § 1594(c), set maximum terms of imprisonment under Title 18.

1. *Wei Lin* Violates the Structural Integrity of the Sentencing Guidelines

The Defendant should not be assigned the base offense level of 14 for his § 1594(c) conviction because this would impose a lower sentence than is typical for less severe offenses.

An interpretation of a statute should not be enforced if it is "fundamentally inconsistent" with the structure of the statute. *Off. & Pro. Emp. Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992). This rule pertains to the Guidelines because the interpretation of Guidelines should consider the "basic rules of statutory construction." *United States v. Mullings*, 330 F.3d 123, 124 (2d Cir. 2003).

Applying a base offense level of 14 in the Defendant's case would be fundamentally inconsistent with the structure of the Guidelines. For example, labor trafficking offenses are given a standard base offense level of 22 under the Guidelines. U.S.S.G. § 2H4.1(a)(1). Accordingly, based on the reasoning of *Wei Lin*, someone with the Defendant's criminal history who is convicted of labor trafficking would receive a sentence of between 84 and 105 months for labor trafficking, but only a sentence of between 37 and 46 months for a sex trafficking conspiracy. *See* PSR ¶ 172 (determining that the Defendant has a criminal history of VI). Such a result would violate the structure and purpose of the Guidelines since sex trafficking is "an especially pernicious form of labor trafficking." *Sims* 957 F.3d at 364 (determining that it would be "inconceivable" that the Sentencing Commission would intend to punish forced labor conspiracies more than twice as harshly as sex trafficking conspiracies). In *Sims*, the court imposed a base offense level of 34, paying special attention to the egregiousness of the defendant's conduct in comparison to a labor trafficking offense. *Id*. Specifically, the defendant "contributed to the forced prostitution, abuse, and drug addiction of numerous young women." *Id*. Moreover, Sims was a "'respect[ed]' member of a gang that 'sexed' women into its employ by forcing them to have sex with a succession of gang members." *Id.*

Here, the Defendant's conduct is similarly egregious. He coerced "Victim 2" into performing "commercial sex acts" by "physically assaulting" her, "threatening" her,

"brandishing a dangerous weapon" at her, and "withholding heroin from her . . . with knowledge and understanding that [she] was addicted to heroin." *See* Indictment ¶ 3(c). Hence, the holding from *Wei Lin* should not apply here, and the Defendant should receive the base offense level of 34, which is consistent in severity with the general structure of the Guidelines.

***2.* *Wei Lin* Violates the Structural Integrity of Title 18**

Second, the Defendant should not be assigned a base level of 14 for his § 1594(c) conviction because this would disregard how Title 18 treats § 1594(c) convictions differently than offenses typically receiving a base offense level of 14. In establishing the Sentencing Commission, 28 U.S.C. § 994 states: "The Commission . . . shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." 29 U.S.C. § 994(b)(1). Furthermore, the Second Circuit has recognized that when an agency is tasked with regulating pursuant to a statute, the court will not defer to an agency interpretation that is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); *see also Auburn Hous. Auth. v. Martinez*, 277 F.3d 139, 144 (2d Cir. 2002).

Categorizing 18 U.S.C. § 1594(c) with statutes that are assigned a base offense level of 14 would be inconsistent with the structure of Title 18, as those statutes provide maximum terms of imprisonment and involve largely nonviolent conduct. In addition to 18 U.S.C. § 1591, 8 U.S.C. § 1328 and 18 U.S.C. §§ 2421, 2422(a) are offenses with base levels evaluated through § 2G1.1 (assuming the offenses involve a victim other than a minor). U.S.S.G. § 2G1.1 cmt. stat. provisions. In contrast to 18 U.S.C. § 1591(b)(1), these offenses are accorded a base offense level of 14. *See* U.S.S.G. § 2G1.1(a)(2); *see also United States v. Hurant*, 16 Cr. 45 (MKB),

2017 WL 3327581 at *1 (E.D.N.Y. Aug. 17, 2017). 8 U.S.C. § 1328 and 18 U.S.C. §§ 2421, 2422(a) expressly limit the maximum imprisonment for these offenses to ten years, ten years, and ten years, respectively. On the other hand, 18 U.S.C. § 1594(c) has a maximum term of imprisonment of "any terms of life," indicating that it prohibits conduct that is more severe and punishable. Additionally, 8 U.S.C. § 1328 and 18 U.S.C. § 2421 do not concern violent conduct, and § 2422(a) rarely concerns violent conduct. Yet, the Defendant's § 1594(c) conviction, like the convictions in *Sims and Carter*, *see Sims*, 957 F.3d at 364; *Carter*, 960 F.3d at 1010, involves violent conduct observable in his use of force and coercion. This provides further reason for distinguishing § 1594(c) from statutes that are assigned the lower base offense level. Thus, a reading of the Guidelines assigning § 1594(c) an equivalent base level to that of these other offenses would be "manifestly contrary" to 28 U.S.C. § 994. *See Chevron*, 467 U.S. at 844. In order to ensure that the Sentencing Guidelines remain consistent with the penalties set forth in Title 18, the § 2G1.1(a)(1) enhancement should apply to 18 U.S.C. § 1594(c) convictions such as the Defendant's.

In full, because the *Wei Lin* holding creates absurd, structurally inconsistent results in relation to the Sentencing Guidelines and Title 18, the Court should reject it and apply the enhanced base offense level of 34 for the Defendant's § 1594(c) conviction.

C. Case law in the Southern District of New York Applies the Enhanced Base Offense Level

Finally, A base offense level of 34 should be applied to the Defendant's § 1594(c) conviction because such a decision would be consistent with prior rulings in this District. Recently, in *United States v. Vanier*, the court expressly recognized that *Wei Lin* was not applicable to the Sentencing Guidelines calculation for § 1594(c), thereby agreeing with the

reasoning set forth by the Third and Eighth Circuits in *Sims* and *Carter*. *United States v. Vanier*, 18 Cr. 873 (VSB), 2021 WL 5989773 at *12 n.11 (S.D.N.Y. Dec. 17, 2021). Additionally, this court has a thorough history of applying the enhanced base offense level for defendants convicted of sex trafficking conspiracies.

In *Vanier*, the defendant pled guilty to a superseding information charging him with conspiracy to commit sex trafficking 18 U.S.C. § 1594(c). As in *United States v. Valdez*, the victim in *Vanier* was a minor, *Id.* at *3, so the base offense level was governed by § 2G1.3. The Superseding Information did not mention the penalty provisions in § (b)(1) or § (b)(2), but it did refer to the defendant's use of "force, threats of force, [and] coercion" during his engagement in the sex trafficking. *Id.* Accordingly, because the allegations in the Superseding Information "matched" the relevant language in § 1591(b)(1) "related to force, fraud, or coercion," and Varnier's allocution satisfied the requisite elements of § 1591(a), Judge Broderick held that the heightened base offense level of 34 applied. Sentencing Tr. at 11:12-16, *United States v. Vanier*, 18 Cr. 873 (VSB), 2021 WL 5989773 at *12 (S.D.N.Y. Dec. 17, 2021). The choice to apply the base offense level enhancement, without a count listed under § 1591(b)(1), bolsters the view proposed by *Sims* and *Li* that the term "offense of conviction" tracks with the conduct of the offense rather than the literal offense of conviction. More importantly, in *Vanier*, Judge Broderick articulated that he agreed with the Third and Eighth Circuit decisions, *Sims* and *Carter*, rejecting *Wei Lin*. *Vanier*, 2021 WL 5989773, at *12 n.11 (criticizing how the Ninth Circuit's decision would drastically lower sentences for defendants convicted under § 1594(c) compared to those convicted of the substantive offense).

Other cases have also demonstrated this District's acceptance of the view that § 1594(c) convictions should receive the same base offense level as their substantive offenses. In *United*

States v. Pierre-Louis, 16 Cr. 541 (CM), 2019 WL 2235886 (S.D.N.Y. May 15, 2019), Judge McMahon held that the defendant's conviction under § 1594(c) of conspiring to violate §§ 1591(a)(1) and (b)(1), required a base offense level of 34. Judge McMahon reasoned that "the base offense level for the conspiracy is the same as the base offense level for the substantive offense," and, in that case the base offense level for the substantive offense was 34. *Id.* Analogously, In *United States v. Almonte*, 16 Cr. 670 (KMW), 2020 WL 6482874 (S.D.N.Y. Nov. 4, 2020), the count of conviction was § 1594(c), but this time as a conspiracy to violate § 1591(b)(2). Judge Wood rejected the defense council's argument, founded on *Wei Lin*, that a base offense level of 14 should be applied and instead held for a base offense level of 30, which corresponds to convictions under § 1591(b)(2). *Id. See also United States v. Goddard*, 17 Cr. 439 (LAP), 2018 WL 4440503 (S.D.N.Y. Sep. 17, 2018) (concluding that, for a conspiracy under 1594(c) to violate § 1591(b)(2), a base offense level of 30 applied).

Like the defendants in each of these cases, the Defendant here was convicted under § 1594(c) and has similarly objected, citing *Wei Lin*. The court should follow its prior rulings and impose the base offense level of 34.

IV. CONCLUSION

The base offense level for the Defendant's 18 U.S.C. § 1594(c) conviction was correctly calculated by the PSR to be 34. The Defendant's objection, citing *Wei Lin*, is misguided because it misconstrues the text of U.S.S.G. §§ 2G1.1 and 2X1.1, violates the structure of the Guidelines and Title 18, and is inconsistent with the prior reasoning in this District.

Applicant Details

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Applicant Education

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JD/LLB From	**Northeastern University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12205&yr=2013**
Date of JD/LLB	**May 17, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission